Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term 2005

Tony L. Ware, CEO, and
T.L. Ware Bottling Company, Inc.

Petitioners

v.

FleetBoston Financial Corporation f/k/a
BankBoston Corporation

Respondent

On Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

TONY L. WARE, PhD, JD, Petitioner
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QUESTIONS PRESENTED

The questions raised in this petition have never been addressed by this Court. There is conflict among the Courts of Appeals concerning the following questions:

1. May the *Rooker-Feldman* doctrine bar the lower Federal Courts form acting as de facto State Appellate Courts from reviewing and setting aside final judgments of a State trial Court through the removal of a final judgment pursuant to 28 U.S.C. § 1441(a) when the State trial Court proceeding has ended with a final judgment thereby allowing the lower Federal Courts to circumvent and bypass 28 U.S.C. § 1257(a) to violate the *Rooker-Feldman* Doctrine and *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005).

2. Did the U.S. District Court have subject-matter jurisdiction over this case because the Respondent, a dissolved corporation, lacked Article III Standing to remove this case from the State Court, because Respondent as dissolved corporation cannot suffer a personal injury. A dissolved corporation cannot suffer any future personal injury and would lack Article III Standing to remove this action from the State Court pursuant to 28 U.S.C. § 1441(a).

3. Did the U.S. District Court lacked subject-matter jurisdiction to grant relief to the Respondent upon removal of this case, when the removal of this case was rendered moot by reason of a final judgment of the State Court and the fact that Respondent was a dissolved corporation prior to removal. The case was no longer a live case in the State Court for removal pursuant to 28 U.S.C. § 1441(a). The Respondent lacked a legally cognizable interest in the outcome of the removed case as a dissolved corporation.

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PARTIES TO THE PROCEEDINGS

Petitioners Tony L. Ware, CEO and T.L. Ware Bottling Company, Inc., is a Georgia corporation are the Plaintiffs in this case and are proceeding in this matter as a matter of right. The Eleventh Circuit has referred to the Plaintiffs "collectively as Ware" as one party. See, Pet. App. 43 at 44. The Respondent FleetBoston Financial Corporation f/k/a BankBoston Corporation is a dissolved Delaware corporation is the Defendant in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tony L. Ware, CEO and T.L. Ware Bottling Company, Inc., proceeding against the above-named Respondent hereby respectfully petition this Honorable Supreme Court to grant Petitioners' Petition for Writ of Certiorari. This Petition will clearly be in aid of this Court's Appellate jurisdiction under 28 U.S.C. § 1257(a).

OPINIONS BELOW

A final judgment and final order of the Superior Court of Fulton County, is reported at Pet. App. 1-17 & Pet. App. 18-24. The final order of the United States District Court for the Northern District of Georgia is reported at Pet. App. 25-42. The opinion and final judgment of the United States Court of Appeals for the Eleventh Circuit is reported at Pet. App. 43-51 & Pet. App. at 52. This case may be further reported in the Federal Appendix and may be cited as: *Ware* v. *FleetBoston Financial Corporation*, ___, Fed. Appx. ___, (11th Cir. 2006).

JURISDICTION

The Opinion and final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 2nd, 2006. A timely petition for writ of certiorari is filed within 90 days of that final judgment. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1), § 2101(c) and the Supreme Court Rules, Rule 10(a).

CONSTITUTIONAL AND STATUTES INVOLVED

The removal statute allows a defendant to remove a pending case in State Court to a Federal Court only if a District Court would have originally had subject-matter jurisdiction. Removal of such case from a State trial Court must be pending as mandated by the Federal removal statute 28 U.S.C. § 1441(a). However, when a State trial Court has entered a final judgment in the State Court, the State case is no longer pending in the State Court for the purpose of removal, and any removal of such case at this stage of the proceeding becomes moot and improper. The removal of any final judgment to Federal Court would require a lower Federal Court to review that final judgment of a State Court in violation of the *Rooker-Feldman* doctrine and 28 U.S.C. § 1257(a). Over the many years, this Court have never addressed the issue of whether the *Rooker-Feldman* doctrine bars removal of final judgments from State trial Court to a U.S. District Court. This case also involves whether a dissolved corporation such as the Respondent in this case, has the Article III Standing under the United States Constitution to remove this case to Federal Court when it has suffered no personal injury as a dissolved corporation. A dissolved corporation cannot suffer any future injury as a matter of law. Article III of the United States Constitution provides that there must be a live case and controversy before a Federal Court have jurisdiction. The removal of this case was clearly moot. This case was no longer a live case at the time of Respondent's removal and the fact that the Respondent lacked a legally cognizable interest in the outcome of the case. Article III of the United States Constitution provides that there must be a case or controversy before a Federal Court can use its judicial power. If a case is moot, a Federal Court has no business in dealing with the merits of this case and must remand the case back to State Court pursuant to 28 U.S.C. § 1447(c).

STATEMENT

The Petitioners brought their civil action on December 7th, 2004 in the Superior Court of Fulton County, (a State Court) in the State of Georgia based upon a ten count Complaint for Damages, Injunction, RICO violations, Fraud, Gross Negligence and other violations of both Federal and State laws and further requested injunctive and other equitable relief against the Respondent. The State trial Court found proper service of process of the Summons, Complaint and Request for Admissions was made on the Respondent FleetBoston Financial Corporation by a Court Appointed Process Server. Respondent FleetBoston failed to file its answer to the Complaint and were deemed in default on January 11th, 2005. Fifteen (15) days elapsed from the date of this default and the default was not opened by FleetBoston as a matter of right or by an order of the State Court as required by O.C.G.A. § 9-11-55(b). See, Pet. App. 53. On January 28th, 2005 after a final hearing of the case in chambers pursuant to O.C.G.A. § 9-11-55(a) and pursuant to the Georgia's Uniform Superior Court Rules, Rule 15, the State Court entered a Final Judgment and Decree in favor of the Petitioners Tony L. Ware and T.L. Ware Bottling Company, Inc. See, Pet. App. 1-17 & 56. However, before any party could appeal that final judgment in the State Appellate Court, five days later on February 2nd, 2005 another trial Court entered an order vacating the final judgment on its own motion without a showing of any meritorious reason and without the consent of the Petitioners in violation of the final judgment. Contrary to the final judgment of the Superior Court, the Order vacating the final judgment did not state whether the final judgment was void for lack of personal jurisdiction (e.g. improper service) or lack of subject-matter jurisdiction or whether there were any nonamendable defects that may appear on the face of the record.

The Superior Court simply set a new trial on the issue of damages. However, on February 7th 2005 the Petitioners filed in the Fulton Superior Court a joint Motion to Set Aside this February 2nd, 2005 Order. The State trial Court heard Petitioners' motion and granted their motion vacating and setting aside the Order of February 2nd, 2005 thereby reinstating the final judgment of January 28th, 2005. See, (Pet. App. 18). On February 8th, 2005 Petitioner Tony L. Ware, CEO acting pro se filed a Notice of Appeal in the Superior Court to protect his rights on appeal and until he could find a proper attorney to represent his legal interest in the final judgment.

On February 15th, 2005 FleetBoston filed a untimely Notice of Removal in the District Court while the Petitioner Tony L. Ware had an appeal pending review by the Georgia Supreme Court, which is the highest State Court, pursuant to 28 U.S.C. § 1257(a). However, after FleetBoston's untimely removal of this action, FleetBoston filed a Motion to Set Aside under Fed.R.Civ.P., 60(b) collaterally attacking the State's Court final judgments on the grounds of insufficiency of service of process and so-called fraud allegations against the Petitioners. The Petitioners then filed their Motion to Dismiss and Remand Case on March 15th, 2005 and later filed a Revised Motion to Dismiss and Remand Case on May 11th, 2005. On April 26th, 2005 Petitioner Tony L. Ware, CEO filed also a Declaratory Judgment action in the State's Superior Court of DeKalb County concerning his rights and interest in the Final Judgment and on matters concerning Georgia Law. Petitioner's deck action was a protective action concerning matters of Georgia Law.

On May 25th, 2005 without any notices to the Petitioners, Respondent's counsels filed a bogus Emergency Motion for injunctive relief and had illegal ex parte meetings or conferences with District Judge Marvin H. Shoob through his law clerk, either personally or via-telephone according to Respondent's records filed with the District Court. On May 26th, 2005 based upon these ex parte communications with Respondent's counsels, the District Court entered its final orders in favor of the FleetBoston. See, Pet. App. 25. The Petitioners on June 23rd, 2005 filed a Notice of Appeal to the Eleventh Circuit and their joint Motion to Set Aside the District Court's final orders pursuant to Fed.R.Civ.P. 60(b)(4)(6) for lack of subject matter jurisdiction under *Rooker-Feldman* doctrine and for other reasons stated in this Petition. The District Judge denied Petitioners' Motion to Set Aside stating that *Rooker-Feldman* doctrine do not apply to cases removed from State Court even though the State trial proceeding had ended as required by *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005).

The Petitioners also raised *Rooker-Feldman* in the Eleventh Circuit. See, Pet. App. 43. Petitioners petition this Supreme Court for a Writ of Certiorari that will be in aid of this Court's appellate jurisdiction under 28 U.S C. § 1257(a). See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L2d 362 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 1315, 75 L.Ed2d 206 (1983) known as the *Rooker-Feldman* doctrine and *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005).

ARGUMENT

A. *ROOKER-FELDMAN* AND REMOVAL

The Eleventh Circuit held that the *Rooker-Feldman* doctrine did not bar the removal of this case. See, Pet. App. 43-51. However, in the First, Second, Sixth, Seventh, Eight, Tenth and Eleventh Circuits Courts of Appeals, the *Rooker-Feldman* doctrine did bar the District Court in this case from reviewing the final judgments of the State Court removed to the District Court pursuant to 28 U.S.C. § 1441(a).

The First Circuit in *Mills* v. *Harmon Law Offices, P.C.*, 344 F.3d 42 (1st Cir. 2004) has held that upon the removal of a State Court case pursuant to 28 U.S.C. § 1441(a) the *Rooker-Feldman* doctrine barred claims litigated to final judgment in State Court. Moreover, the First Circuit in *Mills*, reversed the District Court for dismissing the case on the merits under *Rooker-Feldman* rater than remanding the case back to the State Court pursuant to 28 U.S.C. § 1447(c) for lack of jurisdiction under the *Rooker-Feldman* doctrine. The Second Circuit has also held that the *Rooker-Feldman* doctrine would apply to cases and appeals removed from State Courts pursuant to 28 U.S.C. § 1441(a). See, *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000). The Second Circuit stated in *Freeman* that:

> "The logic of permitting removal once a federal defense has been adjudicated could arguably be invoked to justify removal of a state court appeal from a state trial court decision adjudicating a federal defense. However, removal of such an appeal would encounter the obstacle of the *Rooker-Feldman* doctrine, prohibiting a federal district court from exercising appellate jurisdiction over a state court. See, *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 474

(1983); *Rooker* v. *Fidelity Trust Company*, 263 U.S. 413, 416 (1923)."

The Sixth Circuit in *Anderson* v. *Charter TP. Of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) has held that: ("Township timely remove the cause of action."), See, Id at 490. The Court held that *Rooker-Feldman* barred any collateral attacks on the State Court final judgment after such removal of the case in *Anderson*. See, Id at 492.

The Seventh Circuit Court of Appeals has repeatedly held that *Rooker-Feldman* doctrine bars removal of a State Court final judgment removed pursuant 28 U.S.C. § 1441(a) when a defendant tries to collaterally attack or set aside a final judgment of a State Court. See, *Taylor* v. *Federal National Mortgage Association*, 374 F.3d 529 (7th Cir. 2004). After the civil case was removed in *Taylor* pursuant to 28 U.S.C. 1441(a), Taylor sought to have the State Court's final judgment set aside. See, Id. at 532. The Seventh Circuit concluded in *Taylor* that such a motion to set aside a final judgment after the case was removed to the District Court was nothing more then a de facto appeal barred by *Rooker-Feldman* doctrine. The Seventh Circuit held:

> "In applying the *Rooker-Feldman* doctrine, the immediate inquiry is whether the 'federal plaintiff [or defendant] seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim.' *Kamilewicz* v. *Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996). Claims that directly seek to set aside a state court judgment are de facto appeals and are barred without additional inquiry. However, federal claims presented to the district court that were not raised in state court or that do not on their face require review of a state court's decision

> may still be subject to *Rooker-Feldman* if those claims are 'inextricably intertwined' with a state court judgment."

The Respondent FleetBoston did exactly what *Taylor* did in the case at bar. Upon the removal of this case to District Court, Respondent moved the District Court to vacate and set aside the State Court's final judgment pursuant to Fed.R.Civ.P., Rule 60(b) as a de facto appeal. The Seventh Circuit has also addressed the *Rooker-Feldman* doctrine in other cases removed to a District Court in the cases of *Auston* v. *State of North Carolina*, 116 F.3d 1482, (7th Cir. 1997)(un-publish opinion); *Downs* v. *Westphal*, 78 F.3d 1252 (7th Cir 1996); *Wright* v. *Tackett*, 39 F.3d 155 (7th Cir. 1994). There is no escape of the *Rooker-Feldman* doctrine in the Seventh Circuit when a party attempts to removes a case from State Court seeking to overturn and set aside a State Court final judgment as a de facto appeal.

The Eight and the Tenth Circuits also agree that *Rooker-Feldman* bars attacks after removal of final judgments from State Court. See. *Fielder* v. *Credit Acceptance Corp.*, 188 F.3d 1031 (8th Cir. 1999); *Neal* v. *Wilson*, 112 F.3d 351 (8th Cir. 1997) and *Baby C.* v. *Price*, 138 Fed. Appx. 18, (10th Cir. 2005); *Edwards* v. *Bank of New York*, 63 Fed. Appx. 445 (10th Cir. 2003). Even assuming if *Rooker-Feldman* did not apply to this case, the Second Circuit has held in *Four Keys Leasing & Maintenance Corp.* v. *Simithis*, 849 F.2d 770, 774 (2d Cir 1988) that removal of any final judgment from a State Court is still improper. The Second Circuit has stated that:

> "We agree with the District Court that the state court proceedings constituted a final judgment and that [Defendant] never raised [its] claims in the State Courts. As a consequence, we agree that it should have

> been patently obvious to any attorney who had familiarized himself with the law governing removal of action to federal courts that this was a frivolous action." Id at 773. Emphasis supplied.
>
> "We agree with Judge Duffy, that it would be a perversion of the removal process to allow a litigant who is subject to a final judgment to remove that final judgment to federal court for further litigation. If a claim that is time-barred under state law cannot have life breathed into it by being removed to federal court, certainly a claim that has been reduced to a final judgment in state court cannot be made subject to re-litigation through removal." See, Id. at 774. (Citation omitted).

The above-noted Courts of Appeals clearly establish that the *Rooker-Feldman* doctrine applies to final judgments rendered before the District Court proceeding is "commenced" through removal of that final judgment pursuant to 28 U.S.C. § 1441(a) according to *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). There are many U.S. District Courts rejecting the notion that a party can use the federal removal process to overturn vacate and set aside a final judgment of a State trial Court.

It now appears that the majority of all U.S. District Courts agree that the *Rooker-Feldman* doctrine would bar the re-litigation claims and any collateral attack on a final judgment of a State trial Court when a litigant attempts to removes that final judgment from the State Courts pursuant to 28 U.S.C. § 1441(a). In *Citibank* v. *Swiatkowski*, 395 F. Supp.2d 5, (E.D. N.Y. 2005) the District Court held that the

Rooker-Feldman Doctrine applies to cases removed from State Court pursuant to 28 U.S.C. § 1441(a). The District Court lacked subject-matter jurisdiction over the *Swiatkowskis*' claims. The Court held:

> "Under this doctrine, "federal district courts lack jurisdiction to review state court decisions whether final or interlocutory in nature," *Gentner* v. *Shulman*, 55 F.3d 87, 89 (2d Cir. 1995), and "federal review, if any, can occur only by way of a certiorari petition to the [United States] Supreme Court," *Moccio* v. *New York State Office of Court Admin.*, 95 F.3d 195, 197 (2d Cir. 1996). "Such jurisdiction is lacking because within the federal system, only the Supreme Court may review a state court judgment." *Hachamovitch* v. *DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998). "A federal court must remand a case if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction . . . ." 28 U.S.C. § 1447. Here, the state court issued an order confirming the referee's report and granting a judgment of foreclosure and sale. Swiatkowski can appeal from this judgment to the Appellate Division, Second Department. This Court is not the proper court to review the decisions of the New York State Supreme Court. Immediate review of the New York State Supreme Court can only be entertained by the Appellate Division."

The District Court in *Taylor* v. *Currie*, 386 F. Supp.2d. 929 (E.D. Mich. 2005) noted that the removal of a case from a State Court after final judgment in the State

Court will incur the problem of the *Rooker-Feldman* doctrine concerning any attacks on the State Court final judgment. But see also *Walter* v. *Cox*, 341 F.Supp.2d 670 (E.D. Mich. 2004)(holding that *Rooker-Feldman* doctrine would bar removal). See Id. at 673. In *Washington Mutual Bank, F.A.* v *Catuara*, 313 F. Supp. 2d 782 (N.D. Illinois 2004), Mr. Catuara removed his case to District Court, but Sr. District Judge Shadur held that *Rooker-Feldman* barred Catuara claims against the State Court final judgment. The District Court in *Washington Mutual Bank, F.A.*, held the following:

> "That attempt by Catuara to get lower federal court review of the final judgment by a state court is totally self-destructive, for it brings directly into play the familiar *Rooker-Feldman* doctrine." Id at 784.
>
> "In summary, Catuara has pleaded himself right out of this federal court. 'It is an understatement to say, in the language of 28 U.S.C. § 1447(c), that 'it appears that the district court lacks subject matter jurisdiction.' As directed by that section, this Court orders the case remanded to the state court of origin, and as permitted by this District Court's LR 81.2(b) the Clerk is ordered to mail the certified copy of the remand order forthwith."

In *Plymouth & Brockton Street Ry. Co.* v. *Leyland*, 941 F. Supp. 14 (D. Mass. 1996) the District Court also held that the removal process under 28 U.S.C. § 1441(a) cannot be used as a magnesium for re-litigation of claims that are "inextricably intertwined" with the State Court's judgment. The District Court held that removal of the case in *Plymouth* supra, was barred by the *Rooker-Feldman* doctrine. See, Id at 16. The District Court in *State Farm Indemnity* v.

Fornaro, 227 F. Supp.2d 229 (D.N.J. 2002) held, like the majority of other U.S. District Courts, that the *Rooker-Feldman*'s doctrine bars all claims previously litigated in a State Court prior to the removal of the case to a U.S. District Court. The doctrine thus applies even if the District Court has original jurisdiction under 28 U.S.C. § 1331 or 28 U.S.C. § 1332 through a timely removal pursuant to 28 U.S.C. § 1441(a). See, *Hom* v. *Brennan*, 304 F. Supp.2d 374 (E.D. N.Y. 2004)(holding that it had jurisdiction over the case through removal, but also holding that it lacked subject-matter jurisdiction as to claims attacking the final judgment of the State Court.) See, Id. at 380 b. [7]. See, the U.S. District Court in *Alleyne* v. *City of New York*, 214 F. Supp.2d 244 (S.D. N.Y. 2003) Id. at 216 holding that:

> "The reasoning that led this Court to dismiss the case for lack of subject matter jurisdiction previously on *Rooker-Feldman* grounds applies equally here on removal. Therefore, the Court has already determined that it lacks subject matter jurisdiction over this case." "Accordingly, further to the decision already rendered by this Court in *Alleyne I*, which decision should be entirely familiar to the City which removed this case from the state court, this case is remanded to the Supreme Court of New York, Bronx County, pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction."

Moreover a Three Judge District Court was convened in *Keller v. Davidson*, 299 F. Supp.2d 1171 (D. Colo. 2004) upon the removal of a case against State officials. After the removal in *Keller*, the three-judge District Court held the Court lacked jurisdiction under *Rooker-Feldman* doctrine to hear the counter-claims filed by the State officials attempting to void the State Court's final judgment. See, Id at 1179.

This Court should address this issue and resolve any conflict among the Courts of Appeals concerning the issue of *Rooker-Feldman* and Removal of final judgments of State trial Courts. To advance Petitioners argument, the Eleventh Circuit opinion in *Martyak* v. *Martyak*, 171 Fed. Appx. 768 (11th Cir. 2006) seem to join the First, Second, Sixth, Seventh, Eighth and Tenth Circuits Courts of Appeals opinions which clearly supports Petitioners' arguments. Thus, the removal of this case was improper and was barred by the *Rooker-Feldman* doctrine according to *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Remand was required under 28 U.S.C. § 1447(c). The Eleventh Circuit has affirmed the District Court in *Martyak* v. *Martyak*, 378 F. Supp. 2d 1365 (S.D. Fla. 2005) barring the removal of a final judgment from State Court under *Rooker-Feldman* doctrine. The Eleventh Circuit in *Martyak* v. *Martyak*, 171 Fed. Appx. 768 (11th Cir. 2006) held that the *Rooker-Feldman* doctrine barred the removal of this case from State Court pursuant to 28 U.S.C. § 1441(a) when a Defendant attempts set aside or collaterally attack a final judgment of a State Court. The *Martyak* Court held that:

> "Stephen N. Martyak appeals an order awarding attorney's fees to his exwife, Judith A. Martyak, for Mr. Martyak's improper removal of a state case to federal court. See, 28 U.S.C. § 1447(c). We affirm.
>
> "In August 2005, Mr. Martyak filed a notice of removal in federal district court and sought reversal of the alimony award on the ground that it violated several provisions of the U.S. Constitution. The district court concluded that Mr. Martyak's claims sought federal review of a final state court judgment and it lacked subject matter jurisdiction to review the claims

> under the *Rooker-Feldman* doctrine. See *D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 1311 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 150 (1923). The district court remanded the case to state court and, because Mr. Martyak sought removal in violation of well-settled law, ordered Mr. Martyak to pay Ms. Martyak $8,850 in attorney's fees. "Mr. Martyak's removal of the case was clearly improper. "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings." *Powell* v. *Powell*, 80 F.3d 464, 466 (11th Cir. 1996) (quoting Feldman, 460 U.S. at 482, 103 S. Ct. at 1315). The district court did not abuse its discretion. AFFIRMED."

The U.S. District Court in *Martyak* v. *Martyak*, 378 F. Supp. 2d 1365 (S.D. Fla. 2005) held that a Defendant cannot use the removal process to vacate a final judgment of a State trial Court. The Martyak District Court held:

> "The Court notes that the federal courts are courts of limited jurisdiction. The presumption, in fact, is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. *Fitzgerald* v. *Seaboard System Railroad, Inc.*, 760 F.2d 1249 (11th Cir 1985). In his Notice of Removal, Mr. Martyak invokes this Court's federal question jurisdiction pursuant 28 U.S.C. § 1331, which he further supports by attempting to state certain claims arising under the Constitution of the United States."

> "The Court notes, however, that invocation of the Constitution does not necessarily establish this Court's jurisdiction over a case because 'a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the United States Supreme Court].' *Powell* v. *Powell*, 80 F.3d 464, 466 (11th Cir. 1996) (quoting *Dist. of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983). "The Court further notes that there are two statutory bases for the aforementioned holding: (1) 28 U.S.C. § 1257, which limits federal review of state court proceedings to the United States Supreme Court and (2) 28 U.S.C. § 1331, which provides that federal district courts are courts of original jurisdiction. Id. (citing *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415-16, 68 L.Ed. 362, 44 S.Ct. 149 (1923). "The Court finds, therefore, that the claims of which Mr. Martyak seeks consideration in filing his Notice of Removal are inextricably intertwined with the aforementioned Final Judgment, and that pursuant to the above-cited language from Feldman, he impermissibly asks this Court to sit in review of that same Final Judgment."

Judge Marvin H. Shoob, the same District Court Judge in this appeal, has clearly addressed the ***Rooker-Feldman*** Doctrine in *Winn* v. *Perdue*, 218 F.R.D. 277, (N.D. Ga. 2003).

The State of Georgia removed the ***Winn*** case from State trial Court to the District Court pursuant 28 U.S.C. § 1441(a). However, in the ***Winn*** case, the Judge Shoob held that the ***Rooker-Feldman*** doctrine would bar any re-litigation of claims in the State Court after removal of the State's case pursuant to 28 U.S.C. § 1441(a). Judge Shoob held that the Plaintiffs in ***Winn*** Id at 289, were not attacking or seeking to overturn the State trial Court judgments, thereby implying that if the Plaintiffs were attacking or seeking to overturn the State Court judgments while the case was removed from the State Court, such acts would have been barred by the ***Rooker-Feldman*** doctrine. See, *Winn* v. *Perdue*, 218 F.R.D. 277 at 289 (N.D. Ga. 2003). District Judge Marvin H. Shoob held in part that:

> "To apply the *Rooker-Feldman* doctrine on the basis that plaintiffs' federal claims are inextricably intertwined with their juvenile court proceedings, the Court must find that the federal claims can succeed only to the extent that the juvenile court's orders are erroneous. *Pennzoil,* 481 U.S. at 25. It is clear, however, that the success or failure of plaintiffs' federal claims is completely independent of whether the juvenile courts correctly decided any individual plaintiff's case. Plaintiffs do not challenge any juvenile court order, and the success of their claims does not depend upon a finding that any juvenile court order was wrongly decided. "The cases on which State Defendants rely are inapposite. In two of those cases, the primary relief sought was an injunction preventing enforcement of the state court's child custody order and returning custody to the aggrieved parent. *See Liedel,* 891 F.2d at 1545; *Staley v. Ledbetter,* 837 F.2d 1016,

> 1017 (11th Cir. 1988). In the third, a child's mother sought damages from DFCS employees for actions that supported the juvenile court's custody orders. *See Goodman ex rel. Goodman v. Sipos,* 259 F.3d 1327, 1334 (11th Cir. 2001). No such claims are asserted, and no such relief is sought, by plaintiffs in this case. Thus, the granting of all the relief sought by plaintiffs would not call into question the correctness of any juvenile court order. Therefore, the *Rooker-Feldman* doctrine does not deprive this Court of jurisdiction to hear plaintiffs' claims." See, Winn, 218 F.R.D. at 289 (N.D. Ga. 2003).

Therefore, Judge Marvin H. Shoob, knew that the Rooker-Feldman doctrine would barred the removal of this case from the State Court. However, the decision by Eleventh Circuit in this removed action stated in *Ware* v. *FleetBoston Financial Corp.*, ___, Fed. Appx.. ___, (11th Cir. 2006) see (Pet. App. 25 & 43) and the Eleventh Circuit opinions in *Jackson* v. *American Sav. Mortgage Corp.*, 924 F.2d 195, 197 (11th Cir. 1991); *In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963, 965-66 (11th Cir. 1989); *Maseda* v. *Honda Motor Co., Ltd.*, 861 F.2d 1248, 1252 (11th Cir. 1988) with the opinion by Judge Shoob at Pet. App. 25 clearly conflict with other Courts of Appeals decisions and show a division among the Circuits.

B. RESPONDENT LACKS ARTICLE III STANDING TO REMOVE CASE FROM STATE COURT

The Respondent could not suffer any personal injury as a dissolved corporation and could not legally suffer any future injury as a dissolved corporation. Therefore Respondent lacked Article III standing to remove this case from State Court. Respondent was used by Bank of America Corporation as a "Place Holder Corporation" known in as a "Shell Corporation". See, Pet. App. at 43 & 46. Thus, Bank of America was the only corporation in this action that has Article III Stranding to remove this action from State Court as the real party at interest. In order for any corporation to have Article III Standing as required by the Constitution, a party must have personally suffered an injury in fact and may generally assert only their own rights and cannot raise claims on behalf of third parties.

All claims made by the Respondent are really the claims of Bank of America Corporation. Bank of America is the real party to this case and not Respondent, a dissolved corporation. Bank of America is financing this litigation as evidence by Respondent's counsel Mr. William J. Holley who filed an Affidavit with the District Court on June 22nd, 2005. Typically speaking, Article III standing requires that the Respondent (1) must have suffered an "injury in fact;" (2) there must be a "causal connection" between the injury and the conduct complained of such that the injury is fairly traceable to the challenged action of the plaintiff and not the result of the independent action of some third party not before the court; and (3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." See, *Bischoff* v. *Osceola County, Fla.*, 222 F.3d 874, 883 (11th Cir 2000). Nonetheless, it remains that Respondent must establish that it has suffered some "injury in fact" as a result of the Plaintiff's actions. See, *Bischoff*, 222 F.3d at 884 (citing *Virginia* v. *Amer.*

Booksellers Assoc., Inc., 484 U.S. 383, 392, 98 L.Ed. 2d 782, 108 S.Ct. 636 (1988)); *Munson,* 467 U.S. at 958; *National Council for Improved Health* v. *Shalala*, 122 F.3d 878, 883 (10th Cir 1997)); *Bordell* v. *General Electric Co.*, 922 F.2d 1057, 1061 (2d Cir 1991). The United States Constitution cleary requires that there be a "case" or "controversy" before a lower federal court may decide a case. See, United State Constitution, Art. III, § 2. See, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The constitutional requirements for a federal court to adjudicate a legal case are accompanied by these prudential requirements. See, *Bennett* v. *Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997); *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Together, these constitutional and prudential requirements form the doctrine of standing.

Therefore, Respondent lacked Article III Standing because a dissolved corporation cannot remove a case from State Court when it has suffered no injury in fact. There was no longer a case or controversy when this case was removed from the State Court to the District Court. The Removal of this case was moot and improper. The District Court and the Court of Appeals should have remanded this case back to the State Court pursuant to 28 U.S.C. § 1447(c) as a matter of Federal law.

C. REMOVAL OF THIS CASE WAS MOOT

The District Court lacked subject matter jurisdiction to grant any relief to the Respondent FleetBoston because the case and removal of this case was moot. This case was no longer a live case pending in State Court for removal. The Respondent lacked a legally cognizable interest in the outcome of the case because it was a dissolved corporation. See, *Powell* v. *McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). The removal by FleetBoston was also mooted by the fact that Respondent had legally consented to the jurisdiction of the Georgia State Courts when it appointed the Georgia Secretary of State to become its agent for all legal service of process concerning any lawsuit. See, O.C.G.A. § 14-2-1520. See Pet. App. 32. Like the requirement of standing, mootness is also justiciability doctrine that must be satisfied before a Court may decide a case. See, *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396-97, 100 S.Ct. 1202, 1208-09, 63 L.Ed.2d 479 (1980). District Court lack jurisdiction because of this mootness. *"When the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."* See, *Powell* v. *McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). A case must be remanded to State Court pursuant to 28 U.S.C. § 1447(c) if it is moot, because the District Court can no longer provide any "meaningful relief." Before the lower federal Courts could have addressed the merits of this case, the lower Federal Court should have determine whether it can give meaningful relief to Respondent as a dissolved corporation that no longer exist prior to removal of this case from State Court. Thus, any "meaningful relief" cannot be legally granted to a corporation like the Respondent which has been legally dissolved. The Respondent lacks a legally cognizable interest in the outcome of a case because it is a dissolved corporation. Thus, the removal of this case was moot.

This case should have been remanded back to the State Court as required by 28 U.S.C. § 1447(c). Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" or "Controversies." U.S. Const. Art. III, § 2. The "case or controversy" requirement imposes justiciability limitations on federal courts, and these limitations include mootness. See, *Soliman* v. *United States ex. rel. INS*, 296 F.3d 1237, 1242 (11th Cir 2002). The doctrine of mootness is derived from Article III's "case or controversy" requirement because "an action that is moot cannot be characterized as an active case or controversy." See, *Adler* v. *Duval County Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir 1997). The question of mootness is a threshold inquiry in every case. This Supreme Court has noted:

> "The question of mootness is . . . one which a federal court must resolve before it assumes jurisdiction."

See, *North Carolina* v. *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed. 2d 413 (1971). If the district court is presented with a moot case upon removal, that case must be remanded back to State Court because any decision on the merits would constitute an impermissible advisory opinion. *Al Najjar* v. *Ashcroft*, 273 F.3d 1330, 1336 (11th Cir 2001); *Fla. Ass'n of Rehab. Facilities, Inc.* v. *Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir 2000). A district court lacks the power, on mootness grounds, to decide a case if its decision cannot affect the rights of the litigants in the case. *Rice*, 404 U.S. at 246, 92 S.Ct. at 404 and *Powell* v. *McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969) holding that:

> "[A] case is moot when the parties lack a legally cognizable interest in the outcome."

It is clear that the District Court lacked subject matter jurisdiction because the case and removal was moot prior to removal. See, *Mills* v. *Green*, 159 U.S. 651,653, 16 S.Ct. 132, 132, 40 L.Ed. 293 (1895). This Court has held:

> "It has been long settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

See also *Church of Scientology of California* v. *United States,* 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992). Moreover, the Eleventh Circuit has also stated in *Westmoreland* v. *National Transportation Safety Board,* 833 F.2d 1461, 1462 (11th Cir 1987) the following:

> "Federal courts do no have jurisdiction under the Article III 'Case or Controversy' provision of the United States Constitution to decide questions rendered moot by reason of intervening events. When effective relief cannot be granted because of later events, the (petition for removal) must be dismissed as moot."

The removal of this case was also mooted by the fact that the Respondent had legally consented to the jurisdiction of the State Courts of Georgia when it appointed the Georgia Secretary of State to be its agent for all service of process when it filed its Certificate of Withdrawal pursuant to O.C.G.A. § 14-2-1520(c). See, Pet. App. 1-3 & Pet. App. 54-55.

This fact was undisputed by the parties. Because Respondent had consented to the Georgia State Court

jurisdiction prior to removal, the removal of this case from State Court to District Court was moot. See also *Lee v. Acme Freight Lines*, 54 F.Supp. 397 (N.D. Ga. 1944). For the clear reasons stated the District Court lacked subject matter jurisdiction to hear this case because it was moot.

D. FINAL JUDGMENT WAS FINAL

A Permanent Injunction was granted by the State Court to the Petitioners and not stayed by the Respondent pursuant to Georgia Law O.C.G.A. § 9-11-62(a). See, Pet. App. 1 at 14-15. This permanent injunction was final notwithstanding the fact Petitioner Ware had filed a Notice of Appeal. When a permanent injunction is not stayed as required by Georgia Law O.C.G.A. § 9-11-62(a) such an injunction is final as a matter of law. Georgia Statute reads:

> "Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."

Thus, it is clear that because of the removal of this action, Respondent FleetBoston never appealed or sought a stay of the enforcement of the permanent injunction nor did Petitioner Ware Notice of Appeal stay the finality of the permanent injunction. The Final Judgment was final for the operation of 28 U.S.C. § 1257(a) and the *Rooker-Feldman* doctrine. Furthermore, as the Eleventh Circuit has stated in *Powell* v. *Powell*, 80 F.3d 464 (11th Cir 1996) that:

> "Moreover, the doctrine is not limited to state appellate court judgments. A litigant may not escape application of the doctrine by

merely electing not to appeal an adverse state trial court judgment." Citation omitted.

Regardless of whether an appeal was pending or has not reached the State's highest Appellate Court the *Rooker-Feldman* would still apply. See, Final Judgment at Pet. App. 1 at 14-15 which reads in part that:

> "IT IS HEREBY ORDERED, By this Court that the Defendant, its officers, agents, its servants, its assigns and its successors (such as Bank of America) or any other person, corporation, insurance company, bank or partnership acting under the authority of the Defendant FleetBoston Financial Corporation are hereby permanently enjoined and restrained from the following:
>
> "(d) The Defendant, its officers, agents and its attorneys are hereby permanently enjoined and restrained from filling any motions, pleadings or appeals for the purpose of delaying any rights adjudicated by this Court in favor of the Plaintiffs in this civil action. Nor shall the Defendant or its attorneys acting on behalf of the Defendant file any motions, pleadings or appeals for the purpose of harassing the Plaintiffs of any rights adjudicated by the Court and
>
> "(e) Defendant its officers, agents and its attorneys are hereby permanently enjoined and restrained from harassing the Plaintiffs in any discovery or post judgment discovery matters by asking questions in a matter which is deemed irrelevant to the case so adjudicated by this Court or that such questions has no

> legal value to the Plaintiffs' claims at issue. Nor shall Defendant's attorneys file any motions or pleadings in any other Court having jurisdiction on matters already admitted to by the Defendant and matters adjudicated by this Court in this civil action."

This Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) defines four situations in which a non final judgment will nevertheless be considered "final" for purposes of 28 U.S.C. § 1257 as follows:

(1) Were there are further proceedings, even entire trials yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained, (2) Were the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings, (3) Were the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case and (4) Were the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come [and] refusal immediately to review the state-court decision might seriously erode federal policy. Id 420 U.S. at 479-83.

More recently in *Kansaa* v. *Marsh*, 548 U.S. ___, 2006 this Court has said that Title 28 U. S. C. § 1257 authorizes this Court to review, by writ of certiorari, the final judgment of the highest court of a State when the validity of a state statute is questioned on federal constitutional grounds. This Court has determined that the foregoing authorization permits review of the judgment of the highest court of a State, even though the state-court proceedings are not yet com-plete, "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue." This Court has deemed lower court decisions final for 28 U. S. C. § 1257 purposes in like circumstances, see *Florida* v. *Meyers*, 466 U. S. 380 (1984) (per curiam); South *Dakota* v. *Neville*, 459 U. S. 553 (1983); *New York* v. *Quarles*, 467 U. S. 649 (1984) and did so in *Kansas*, Supra. Other Courts of Appeals has also held that *Rooker-Feldman* applies to non-final state court judgments. See also *Doe & Associates Law Offices* v. *Napolitano*, 252 F.3d 1026 at 1030 (9th Cir. 2002); *Richardson* v. *District of Columbia Court of Appeals*, 83 F.3d 1513 at 1515 (D.C. Cir. 1996); *Texaco, Inc.* v. *Pennzoil Co.*, 754 F.2d 1133 (2nd Cir. 1996); *Port Authority PBA* v. *Port Auth. Of N.Y. & N.J.*, 973 F.2d 169, 177, (3rd Cir. 1992); *Hale* v. *Harney*, 786 F.2d 688, 691 (5th Cir. 1986)(all agreeing with the holding that the *Rooker-Feldman* doctrine applies to non-final State Court judgments). However, when the State Court in this case entered its final judgments, the case was no longer pending for removal to the District Court because it was at the appellate stage of the proceeding. See, *Smithson* v. *Harry Norman, Inc.*, 192 Ga. App. 796, 386 SE2d 546 (1989) holding that ("*A default judgment being a final and appealable judgment*").

REASONS FOR GRANTING THE WRIT

There is division among the Courts of Appeals concerning whether the *Rooker-Feldman* doctrine bars removal of cases and final judgments from the State trial Courts under 28 U.S.C. § 1441(a) when a final judgment is entered in the State trial Court prior to removal. First, the United States Court of appeals for the Eleventh Circuit has entered conflicting decisions on the *Rooker-Feldman* doctrine in *Ware* v. *FleetBoston Financial Corp.*, ___, Fed. Appx.. ___, (11th Cir. 2006). See, Pet. App. 43 with the opinions in *Jackson* v. *American Sav. Mortgage Corp.*, 924 F.2d 195, 197 (11th Cir. 1991); *In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963, 965-66 (11th Cir. 1989); *Maseda* v. *Honda Motor Co., Ltd.*, 861 F.2d 1248, 1252 (11th Cir. 1988).

These decisions clearly conflict with the decisions of other United States Courts of Appeals concerning the *Rooker-Feldman* doctrine as stated in *Mills* v. *Harmon Law Offices, P.C.*, 344 F.3d 42 (1st Cir. 2004); *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000); *Anderson* v. *Charter TP. Of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001); *Taylor* v. *Federal National Mortgage Association*, 374 F.3d 529 (7th Cir. 2004); *Auston* v. *State of North Carolina*, 116 F.3d 1482, (7th Cir. 1997)(un-publish opinion); *Downs* v. *Westphal*, 78 F.3d 1252 (7th Cir 1996); *Wright* v. *Tackett*, 39 F.3d 155 (7th Cir. 1994); *Fielder* v. *Credit Acceptance Corp.*, 188 F.3d 1031 (8th Cir. 1999); *Neal* v. *Wilson*, 112 F.3d 351 (8th Cir. 1997); *Baby C.* v. *Price*, 138 Fed. Appx. 18, (10th Cir. 2005); *Edwards* v. *Bank of New York*, 63 Fed. Appx. 445 (10th Cir. 2003) on the same important matter. The second reason for granting the writ is that this Court should resolve a conflict within a divided Court of Appeals for the Eleventh Circuit.

The decision in this case in *Ware* v. *FleetBoston Financial Corp.*, ___, Fed. Appx. ___, (11th Cir. 2006)(holding that *Rooker-Feldman* doctrine do not bar removal of final judgment of a State trial Court under 28 U.S.C. § 1441(a) (See Pet. App. 43) clearly conflict with the decision by the Eleventh Circuit in *Martyak* v. *Martyak*, 171 Fed. Appx. 768 (11th Cir. 2006) (hold that the *Rooker-Feldman* doctrine does bar the removal of a final judgment from the State Court under 28 U.S.C. § 1441(a).

The third reason is that the Eleventh Circuit has clearly sanctioned a departure from the majority of most Federal Courts of Appeals concerning the *Rooker-Feldman* doctrine and the removal statute pursuant to 28 U.S.C. § 1441(a) as to call for this Court's exercise of its supervisory power over the lower Courts of Appeals and District Courts.

The forth reason for granting the writ is that the Court has never addressed the issue of whether a dissolved corporation has Article III standing to remove a case from State Court when such corporation has suffered no injury in fact. Nor has the Court ever addressed the issue of whether entry of a final judgment in the State trial Court rendered moot the removal of a case to Federal Court under 28 U.S.C. § 1441(a) or whether removal by a dissolved corporation under 28 U.S.C. § 1441(a) was moot.

CONCLUSION

The lower Federal Courts should not be granted jurisdiction to review the final judgments of a State trial Court through the removal of that final judgment under 28 U.S.C. § 1441(a) to the District Courts. Review of such final judgment would clearly violate 28 U.S.C. § 1257(a) and the *Rooker-Feldman* doctrine. If allowed by this Court, such action would discredit the judicial authority of State Courts and open the way to an additional and routine level of review by way of a collateral attack on any State trial Court final judgment thereby rejecting the *Rooker-Feldman* doctrine no matter how carefully litigated or disposed of the State Court case. This new method of review of final judgments of the State Courts would be inconsistent with the principles of federalism carefully developed over the years by this Court. Because there is conflict and division among the Federal Courts of Appeals concerning whether the *Rooker-Feldman* doctrine and *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005) bars removal of final judgments pursuant to 28 U.S.C. § 1441(a) and because of the fact that this Court has never addressed the issues raised in this petition, this Court should grant certiorari as a matter of Federal law. The lower Federal Courts should not be allowed to bypass 28 U.S.C. § 1257(a) by reviewing final judgment of a State trial Court pursuant to 28 U.S.C. § 1441(a) when the State trial Court proceeding has ended with a final judgment. It is clear that the Eleventh Circuit opinion in this case evades into this Court's exclusive appellate jurisdiction pursuant to 28 U.S.C. § 1257(a) and violate the *Rooker-Feldman* doctrine according to *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). By allowing any defendant to circumvent the States' Appellate Courts through the removal process, such actions would clearly nullify the States Appellate Courts' jurisdiction.

If the removal of any final judgment from a State trial Court is allowed by this Supreme Court, then the need to have a State Appellate Court to review such final judgment would become irrelevant to a defendant. Any defendant who becomes dissatisfied with the outcome of the State trial Court proceeding would now be allowed to remove pursuant to 28 U.S.C. § 1441(a) any final judgment against a defendant by the State Court only to have that final judgment set aside by a lower Federal Court as a de facto appeal.

This Court must resolve the conflict among the Courts of Appeals before the State Courts jurisdiction be diminished by the ~~lower~~ Federal Courts. The State Courts should be free to enter and enforce their own final judgments and free from any interference from the lower Federal Courts. This Supreme Court is the proper Court for the review of any errors made by the State Court and our United States Congress have said so under its grant of exclusive jurisdiction to this Court pursuant to 28 U.S.C. § 1257(a). Therefore, the *Rooker-Feldman* doctrine must bar Respondent removal of Petitioners final judgments from State Superior Court as a matter of Federal law.

Respectfully Submitted,

T L. Ware

Tony L. Ware, PhD, JD, Petitioner
T.L. WARE BOTTLING COMPANY, INC.

JUL 2 7 2005

APPENDEX 1

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

TONY L. WARE, CEO and T. L. WARE BOTTLING CO., INC., Plaintiffs, vs. FLEETBOSTON FINANCIAL CORP. F/K/A BANKBOSTON CORP. Defendant.	) CIVIL ACTION) FILE No. 2004CV94553) FINAL JUDGMENT AND DECREE) PRESIDING JUDGE BROGDON

FINAL JUDGMENT AND DECREE

This civil matter having come before this Court on a final hearing on the Plaintiffs' Joint Motion for Default Judgment pursuant to O.C.G.A. § 9-11-55(a) and their Joint Motion for Summary Judgment on the issue of damages pursuant to O.C.G.A. § 9-11-56(a) with the consent of the Plaintiffs in this action. Based upon the record in this action, the evidence presented to the Court by the parties and applicable State law the Court finds that as a matter of law sufficient grounds exist for the granting thereof. The Court hereby GRANT the Plaintiffs' Joint Motion for Default Judgment and Summary Judgment and enters final judgment as follows:

I. FINDINGS OF FACT

The Court makes the following findings of fact:

The Plaintiffs Tony L. Ware, CEO and T.L. Ware Bottling Company, Inc., brought this civil action on December 7th, 2004 based upon their ten count Complaint for Damages, Injunction, RICO

violations, Fraud, Gross Negligence and other violations of both Federal and State laws and further requesting injunctive and other equitable relief concerning all other claims and disputes against the Defendant FleetBoston Financial Corporation f/k/a/ BankBoston Corporation.

Defendant FleetBoston is a foreign corporation having withdrawn from doing business in this State pursuant to O.C.G.A. § 14-2-1520(b). After proper service of process of the Summons and Complaint on December 10th, 2004 on the Defendant by a Court Appointed Process Server, the Defendant failed to file its answer to the Summons and Complaint and became in default on January 11th, 2005.

The Court finds that fifteen (15) days having elapsed from the date of this default and the default not having been opened as a matter of right or by an order of this Court and hence the Plaintiffs are clearly entitled to a judgment by default against the Defendant as a matter of law. The Plaintiffs has submitted to the Court their joint Motion for Default Judgment and Summary Judgment on the issue of damages with stipulations filed by the parties Plaintiffs. The Court finds that there are no just reasons for delay of the entry of this final judgment and therefore enters final judgment for the Plaintiffs as to all claims pursuant to O.C.G.A. § 9-11-54(b).

II. DISCUSSION

There is no dispute that Defendant FleetBostion is a foreign corporation withdrawn from doing business in this State pursuant to O.C.G.A. § 14-2-1520(b). See, (Plaintiffs' Complaint Exhibit "A") and that proper service of process was made on the Defendant by a

Court Appointed Process Server by serving the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1520(c). See, Return of Service at Docket No. E4. Defendant failed to file its answer to the Summons and Complaint and became in default on January 11th, 2005. The Plaintiffs having filed their joint Motion for Default and Summary Judgment on the issue of Damages, such motion can be heard by the Court. Therefore, the Court holds that since Defendant is in default liability is establish by the operation of law. See, O.C.G.A. § 9-11-55(a).

III. HEARING ON THE ISSUE OF DAMAGES

The only issue that remain in this civil action are the issue of damages. With the consent of the Plaintiffs, the Court will entertain their joint Motion for Default Judgment and Summary Judgment on the issue of damages. Defendant has legally waived all further notices in this action pursuant to O.C.G.A. § 9-11-5(a). Defendant is not entitled to any notice of the final hearing on the Plaintiffs' joint motion.

There has been a long line of cases rendered by our Georgia Supreme Court which holds that the failure of a Defendant to file pleadings in an action is deemed a waiver by that Defendant of all further notices to that Defendant in the civil action. This includes all notices of time and place of trial and the issuing of any final decree in the action. See, *Lucas v. Lucas*, 273 Ga. 240, 539 SE2d 807 (2000); *Harris v. Harris*, 258 Ga. 496, 371 SE2d 399 (1988); *Hardwick v. Hardwick*, 245 Ga. 570, 266 SE2d 184 (1980); *Brooks v. Brooks*, 242 Ga. 444, 249 SE2d 244 (1978).

Thus, this waiver of further notices of a hearing and the time and place of trial provided by O.C.G.A. § 9-11-5(a) would control over any conflicting Court Rules. See, *Hulsey Pool Co. v. Troutman*, 167 Ga. App. 192, 306 SE2d 83 (1983).

Therefore, the Court holds that Defendant in this action has waived all notices of the entry of this final judgment as a matter of law and that the Court will turn its attention to the Plaintiffs' Motion for Default Judgment, Summary Judgment on the issue of damages and the record in this civil proceeding.

(a) DEFENDANT FLEETBOSTION'S ADMISSIONS

When the Plaintiffs served the Defendant with their Complaint for Damages they also served the Defendant with a copy of "Plaintiffs' Request for Admissions." See, Docket No. E4. Defendant also failed to answer the Plaintiffs' request for admissions in this action. See, Docket No. E3. Under O.C.G.A. § 9-11-36(a) all matters which are not denied or objected to by a Defendant shall be deemed admitted if not denied by a Defendant within the time permitted for answering a request for admissions. Because Defendant FleetBoston did not answer, object or deny the Plaintiffs' request for admissions, the Court holds that the Defendant FleetBoston made the following judicial admissions to wit:

> "2. The Defendant FLEETBOSTION FINANCIAL CORP., admits that it has committed all acts stated in the Plaintiffs' Complaint and that all exhibits attached thereto are also admitted as true."
>
> "4. The Defendant FLEETBOSTION FINANCIAL CORP.,

admits to the Court or the Jury that the Plaintiffs are entitled to statutory property damages in the Complaint not less than the amount of $75,507,000.00 [Seventy-five Million Five Hundred and Seven Thousand Dollars] and further waives all other defects and objections to the contrary in this civil action."

"5. The Defendant FLEETBOSTION FINANCIAL CORP., admits to the Court or the Jury that the Plaintiffs are entitled to punitive damages of not less than the amount of $95,000,000.00 [Ninety-five Million Dollars] and further waives all other defects and objections to the contrary in this civil action."

"6. The Defendant FLEETBOSTION FINANCIAL CORP., admits to the Court or the Jury that Plaintiff is entitled to pre interest judgment from June 4th, 1994 until the date final judgment is entered and further waives all other defects and objections to the contrary in this civil action."

"8. The Defendant FLEETBOSTION FINANCIAL CORP., admits that the Plaintiffs' Complaint for damages states a legal claim to which relief can be granted by the Court and that a motion to dismiss Plaintiffs' Complaint or to set aside any final judgment under O.C.G.A. § 9-11-60(d) based upon such grounds would be without merit by the Defendant. Therefore, the Complaint states a legal claim for relief and is deemed true and

correct without any objections made by the Defendant."

"9. The Defendant FLEETBOSTION FINANCIAL CORP., admits that there are no genuine issues as to any material facts as to liability and damages and that the Plaintiffs are entitled judgment to a Summary Judgment on the issue of liability and damages as a matter of law and waives any defects or objections to the contrary."

"11. The Defendant FLEETBOSTION FINANCIAL CORP., admits that any amendments or withdrawal of these admissions by the Court or by the Defendant concerning the matters admitted would cause the Plaintiffs an undue burden and would be prejudice to them and the case will not be best served."

These un-withdrawn admissions made by the Defendant FleetBoston Financial Corporation are deemed judicial admissions and cannot be overlooked or set aside by this Court. See, O.C.G.A. § 9-11-36(b). The statute reads in part that:

"(b) Effect of admission. Any matter admitted under this Code Section is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission."

(b) TRIAL COURT'S DISCRETION

This Court will only have discretion under O.C.G.A. § 9-11-36(b) when a party moves to determine the sufficiency of the answers

or objections filed in response to a request fc. admissions. See, *Mountain View Enters, Inc. v. Diversified Systems*, 133 Ga. App. 249, 211 SE2d 186 (1974). Defendant should have moved to amend or withdraw its admissions in order for this Court to use its discretion. However, without such a timely motion made by the Defendant FleetBoston to withdraw or amend its admissions this Court as a matter of law is without discretion, authority or jurisdiction to set aside or amend Defendant's admissions on its own motion.

(c) GEORGIA'S SUPREME COURT RULE ON ADMISSION

This Court is also bound by the holding made by our Georgia Supreme Court in *G.H. Bass & Co. v. Fulton County Bd. Of Tax Assessors*, 268 Ga. 327, 486 SE2d 810 (1997) holding that a Defendant's un-withdrawn admissions are deemed admitted when not denied. The Georgia Supreme Court held in part that:

> "The [Defendant] did not move the trial court to allow the withdrawal or amendment of its admissions either before or after [the Plaintiffs] raised the legal effect of the [Defendant's] failure to respond to its requests and did not offer any justification for its failure to respond which would have authorized the trial court to exercise its discretion under O.C.G.A. § 9-11-36(b) to relieve the [Defendant] from the consequence of its admissions. Because the [Defendant] did not avail itself of any of the variety of the responses available under O.C.G.A. § 9-11-36 and chose not to seek the liberal remedies afforded to parties under the statute to avoid the consequences of a failure to respond, we hold that the subject matter of

[Plaintiffs'] requests for admission stood admitted."

"The language in O.C.G.A. § 9-11-36(a) is clear, unambiguous, and unequivocal and means just what it says. One must comply strictly and literally with the terms of the statute upon the peril of having his response construed to be an admission."

"While we recognize that the result on the [Defendant] may be criticized as harsh or draconian, our holding benefits both bench and bar in that it promotes constancy and stability in the law by clarifying that the plain language of a civil practice statute will be applied consistently to all parties; hence, all practitioners will be able to govern their behavior accordingly."

"Because the admissions were not withdrawn or amended, the Court of Appeals erred by holding that the [Defendant's] failure to respond was a matter of no consequence."

"Judgment reversed."

With emphases supplied and citations omitted. Thus our Georgia Court of Appeals has echoed the Georgia Supreme Court holding in its opinions in *Mays v. Ed Voyles Chrysler-Plymouth, Inc.*, 255 Ga. App. 357, 565 SE2d 515 (2002); *Solis v. Lamb*, 244 Ga. App. 8, 534 SE2d 582 (2000). The Georgia Court of Appeals has ruled in *Mays v. Ed Voyles Chrysler-Plymouth, Inc.*, Supra, that:

"A matter admitted in response to requests for admission under

> O.C.G.A. § 9-11-36 is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission.... Such a solemn admission in judicio is conclusive as a matter of law on the matter stated and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion."

Because this Court has already found that the Defendant has admitted that the Plaintiffs are entitled to not less than $75,507.000.00 in property damages, $95,000,000.00 in punitive damages and pre judgment interest from June 4th, 1994 until the date final judgment is entered in this civil action.

The Court holds that there are no genuine issue as to any material fact concerning the amount of damages and that the Plaintiffs are entitled to Summary Judgment on the issue of damages as a matter of law. See, *Mays v. Ed Voyles Chrysler-Plymouth, Inc.*, 255 Ga. App. 357, 565 SE2d 515 (2002).

IV. CONCLUSIONS OF LAW

The Court conclude that the Plaintiffs made proper service of process on Defendant FleetBoston Financial Corporation with the Summons, Complaint and Request for Admissions by serving the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1520(c) the law of this State. See, Docket No. E3.

The Court further conclude that the Defendant is in default as a matter of law and that Defendant FleetBostion has legally waived all further notices in this action pursuant to O.C.G.A. § 9-11-5(a). This also includes notice of time and place of trial and the issuing of any final judgment and decree in this civil action.

The Court further conclude that the admissions made by the Defendant FleetBoston Financial Corporation as to the amount of damages are deemed judicial admissions and cannot be overlooked by this Court and is therefore binding on this Court. See, O.C.G.A. § 9-11-36(b). Because of Defendant's solemn admissions in judicio are binding, they are conclusive on the issue of damages and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion.

Therefore, the Plaintiffs are entitled to relief sought and that this Court has jurisdiction to grant the Plaintiffs' request for relief concerning their joint Motion for Default Judgment and Summary Judgment on the issue of damages in this civil action. See, Georgia Constitution, Article VI Section IV Paragraph I, O.C.G.A. § 9-11-55(a) and O.C.G.A. § 9-11-56(a).

Therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED, That final judgment is entered in favor of the Plaintiffs Tony L. Ware, CEO and T.L. Ware Bottling Company, Inc., against the Defendant FleetBoston Financial Corporation in the amount of $75,507,000.00 in property damages which damages are tripled pursuant to O.C.G.A. § 16-14-6(c) the (Georgia RICO Act) and 18 U.S.C. § 1964(c) the (Federal RICO Act) resulting in a total amount of $226,521,000.00 in favor of the Plaintiffs against Defendant FleetBoston Financial Corporation.

IT IS FURTHER ORDERED, That the Plaintiffs shall have punitive damages against the Defendant for its illegal actions, frauds, willful misconduct, wanton, illegal thefts and RICO violations in the amount of $95,000,000.00 in punitive damages which damages are

tripled pursuant to O.C.G.A. § 16-14-6(c) the Georgia RICO Act and 18 U.S.C. § 1964(c) the Federal RICO Act resulting in a total amount of $285,000,000.00 in favor of the Plaintiffs against Defendant FleetBostion.

IT IS FURTHER ORDERED, That the Plaintiffs shall have pre judgment interest against the Defendant FleetBoston Financial Corporation concerning the Plaintiffs' property damage claims from June 4th, 1994 upon entry of this judgment in the amount of $410,746,265.24 pursuant to O.C.G.A. § 51-12-14(c). See, Affidavit at Docket No. E6. Thus, the Plaintiffs shall have a total final judgment against Defendant FleetBoston Financial Corporation in the principle amount of $511,521,000.00 and pre judgment interest in the amount of $410,746,265.24.

IT IS FURTHER ORDERED, That the Defendant shall pay any and all post judgment interest that accrues on this final judgment after the entry of this final judgment pursuant to O.C.G.A. § 7-4-12.

IT IS FURTHER ORDERED, That the Clerk of this Court shall issue a Writ of Execution (Fi Fa) in the principle amount of $511,521,000.00 with interest in the amount of $410,746,265.24 and the Court cost of this action. Upon the Clerk issuing the Writ of Execution (Fi Fa), Defendant FleetBoston Financial Corporation formerly known as BanKBoston Corporation shall immediately pay and satisfy the final judgment of this Court as stated in such Writ of Execution (Fi Fa) and upon Defendant receiving a certified copy of this final judgment and the Writ of Execution.

IT IS FURTHER ORDERED, By this Court that unless the Defendant show good cause to this Court why it cannot pay or satisfy

the final judgment of this Court with pre judgment interest, or if the Defendant fails or refuses to make payment of the final judgment including pre judgment interest to the Plaintiffs within 7 days upon receipt of a copy this order; then the Court hereby adjudges the Defendant in civil contempt of this Court. See, *Griggers v. Bryant*, 239 Ga. 244, 236 SE2d 599 (1977); *Wagner v. Commercial, Inc.*, 203 Ga. 1, 45 SE2d 205 (1945).

IT IS FURTHER ORDERED, By this Court that the Defendant shall be subject to pay the Plaintiff in addition to the final judgment and post judgment interest, a civil penalty of $25,000.00 per day until the Defendant purges itself of such contempt by complying with the terms of this final judgment. See, *In re Harvy*, 219 Ga. App. 76, 464 SE2d 34 (1995). This civil penalty will only apply if the Defendant fails to comply with the terms of this order within (7) days upon receiving notice of this order by the Court or by the Plaintiffs. The Defendant, its subsidiaries that are operating in this State, their officers and agents will be subject to further civil and criminal penalties and a writ of injunction that will enjoin them from operating in this State until Defendant has complied with the terms of this final judgment.

IT IS FURTHER ORDERED, That the Sheriffs of this State and their lawful Deputies are hereby ordered to take all actions needed to seize all monies, property and assets which is not exempt by law held by any persons, corporations, partnerships, banks or holding companies held on behalf of the Defendant or that is in the possession of the Defendant located within the jurisdiction of this State.

IT IS FURTHER ORDERED, By this Court that the Defendant shall post supersede bonds in the amount of $511,521,000.00 representing the principal and $410,746,265.24 representing the pre judgment interest before the Defendant can file any pleadings, motions or appeals in this action. The Clerk of this Court is hereby directed not to file any motions, appeal or any other documents into this Court on behalf of the Defendant except an affidavit by the Defendant's CEO explaining why the Defendant cannot post the supersede bonds stated in this decree. Nor shall the Clerk of this Court set any hearings on any other matter before any other Judge of this Court until said Defendant has posted a total of $922,267,265.24 in supersede bonds with the Clerk of this Court.

IT IS FURTHER ORDERED, By this Court that the Clerk of this Court is also directed to served a certified copy of the Writ of Execution (Fi Fa) and this final judgment entered on the Defendant FleetBoston Financial Corporation by U.S. Certified Mail pursuant to O.C.G.A. § 14-2-1520(c) addressed to:

M. A. FERRUCCI, President & CEO
FLEETBOSTION FINANCIAL CORPORATION
c/o Cathy Cox, Secretary of State
2 Martin Luther King Jr., Drive, Suite 315
Atlanta, Georgia 30334-1530

IT IS FURTHER ORDERED, By this Court that the Plaintiffs shall also be authorized to prefect service of a copy of this final judgment and the Writ of Execution (Fi Fa) on the Defendant FleetBoston Financial Corporation f/k/a BankBoston Corporation by U.S. Certified Mail at any of the other addresses of the Defendant listed in the office of the North Carolina's Secretary of State. Any service made by the Clerk of this Court or the Plaintiffs in this action

pursuant to this order shall be deemed perfected on the Defendant pursuant to O.C.G.A. § 14-2-1520(c).

V. BILL OF PEACE AND INJUNCTION

IT IS HEREBY ORDERED, By this Court that the Defendant, its officers, agents, its servants, its assigns and its successors (such as Bank of America) or any other person, corporation, insurance company, bank or partnership acting under the authority of the Defendant FleetBoston Financial Corporation are hereby permanently enjoined and restrained from the following:

(a) The Defendant is hereby permanently enjoined and restrained from assisting or aid and aiding its subsidiaries, its officers, agents and servants in performing any illegal acts averred by the Plaintiffs and deemed by the Court to be illegal and a fraud against the Plaintiffs and other consumers in the State of Georgia;

(b) The Defendant is hereby permanently enjoined and restrained from operating in this State without a Certificate of Authority from the Georgia Secretary of State;

(c) The Defendant, its officers, agents and its attorneys are permanently enjoined and restrained committing any further torts against the Plaintiffs as stated in their Complaint;

(d) The Defendant, its officers, agents and its attorneys are hereby permanently enjoined and restrained from filling any motions,

pleadings or appeals for the purpose of delaying any rights adjudicated by this Court in favor of the Plaintiffs in this civil action. Nor shall the Defendant or its attorneys acting on behalf of the Defendant file any motions, pleadings or appeals for the purpose of harassing the Plaintiffs of any rights adjudicated by the Court and

(c) Defendant its officers, agents and its attorneys are hereby permanently enjoined and restrained from harassing the Plaintiffs in any discovery or post judgment discovery matters by asking questions in a matter which is deemed irrelevant to the case so adjudicated by this Court or that such questions has no legal value to the Plaintiffs' claims at issue. Nor shall Defendant's attorneys file any motions or pleadings in any other Court having jurisdiction on matters already admitted to by the Defendant and matters adjudicated by this Court in this civil action.

VI. ENFOCEMENT PROVISIONS OF FINAL JUDGMENT

IT IS FURTHER ORDERED, By this Court that it shall be the duty of the Sheriffs of this State located within their legal jurisdiction where all provisions of this final judgment can be enforced against the Defendant FleetBoston and that said officer or officers shall take all actions and proper steps needed when requested to do so by the Plaintiffs in enforcing this final judgment by performing the following:

a. Arrest anyone who may resisting or interfering with the enforcement of this final judgment in the present of such officer(s) as legal contempt of this Court;

b. Make any Police report and document all claims in such report when requested by the Plaintiffs or their authorized agents concerning any violations of the laws of this State;

c. Take possession of Defendant's assets which may be in the legal possession of any banks, holding company, corporation, partnership or insurance company and;

d. Perform any other act which may ad in the enforcement of this final judgment provided however that such act may not conflict with the laws of this State.

IT IS FURTHER ORDERED, That when assistance is requested by the Plaintiffs for the enforcement of any provisions of this final judgment said officer or officers shall assist the Plaintiffs and enforce the provisions of this final judgment.

IT IS FURTHER ORDERED, That the Plaintiffs has consented to the total payment and satisfaction of this judgment to be made payable to the Plaintiff T.L. Ware Bottling Company, Inc., by the Defendant. Furthermore, this consent final judgment shall not be amended, modified or set aside by the parties or the Court without the consent of the parties Plaintiffs or without a notice of a hearing to the Plaintiffs by the Clerk of this Court at the Plaintiffs' address of record in this action.

IT IS FURTHER ORDERED, That this final judgment shall be a standing order of this Court in the above-styled civil matter and is entered as final judgment pursuant to O.C.G.A. § 9-11-54(b) unless reversed, modified or set aside by any of the appellate Courts in this State.

IT IS SO ORDERED, This 28TH day of January 2005.

M. Gino Brogdon /s/

Hon. M. GINO BROGDON, Presiding Judge
SUPERIOR COURT OF FULTON COUNTY

IT IS HEREBY AGREED TO BY THE PARTIES,

Agreed and Consented to By:

Michael R. Johnson, Sr. /s/

Michael R. Johnson, Sr.
Attorney for the Plaintiff
Georgia Bar No. 395056
Johnson & Associates, P. C.
340 West Peachtree Street, N.E.
Suite 200
Atlanta, Georgia 30308
(404) 688-7100

Agreed and Consented to By:

Tony L. Ware, /s/

Tony L. Ware, JD, Plaintiff
Chairman & CEO
P.O. Box 150524-0227
Atlanta, Georgia 30315-0188
(404) 945-0342

APPENDEX 18

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

TONY L. WARE, CEO and T. L. WARE BOTTLING CO., INC., Plaintiffs, vs. FLEETBOSTON FINANCIAL CORP. F/K/A BANKBOSTON CORP. Defendant.	) CIVIL ACTION) FILE No. 2004CV94553 ORDER ON MOTION PRESIDING JUDGE BAXTER

ORDER

The Plaintiffs in this civil matter having come before this Court for a hearing on their Motion to Set Aside an Order pursuant to O.C.G.A. § 9-11-60(a) and (d)(1) with their consent in this action. Based upon the record in this action, the evidence presented to the Court by the parties and applicable State law the Court finds that as a matter of law sufficient grounds exist for the granting thereof. The Court hereby GRANT the Plaintiffs' joint Motion to Set Aside this Court's Order entered on February 2nd, 2005 vacating this Court's final judgment on January 28th, 2005 as follows:

I. FINDINGS OF FACT

The Court makes the following findings of fact:

The Plaintiffs Tony L. Ware, CEO and T.L. Ware Bottling Company, Inc., brought this civil action on December 7th, 2004 based upon their ten count Complaint for Damages, Injunction, RICO violations, Fraud, Gross Negligence and other violations of both Federal and State laws and further requesting injunctive and other

equitable relief concerning all other claims and disputes against the Defendant FleetBoston Financial Corporation f/k/a/ BankBoston Corporation.

After proper service of process of the Summons and Complaint on the Defendant on December 10th, 2004 by a Court Appointed Process Server, the Defendant failed to file its answer to the Summons and Complaint and became in default on January 11th, 2005.

On January 28th, 2005 this Court entered a Final Judgment and Decree in favor of the Plaintiffs. See, Docket No. 10. Before any party could appeal such final judgment this Court entered a order vacating said final judgment on its own motion without a showing of any meritorious reason. See, Docket No. 11.

Contrary to the final judgment of this Court the Order vacating the final judgment did not state whether or not said final judgment was void or whether there were any nonamendable defects which may appear on the face of the record. The Court further finds that the final judgment entered in this action was not void for lack of jurisdiction over the parties or the subject matter in this case. Nor are there any nonamedable defects which would authorized this Court to set aside or vacate the final judgment entered by this Court.

Thus the final judgment entered on January 28th, 2005 limited this Court's own inherent power and jurisdiction to amend, modify or set aside the final judgment as it relates to this case without first giving the Plaintiffs a notice of a hearing and a right to be heard by the Court prior to vacating and setting aside the final judgment of this Court. See, Docket No. 10 Final Judgment at Page 12.

Therefore this Court finds that as a matter of law, there are no meritorious reasons to vacate the final judgment entered on January 28th, 2005 and the Order vacating such final judgment is void on its face for lack of jurisdiction.

II. DISCUSSION

Notwithstanding this Court's inherent authority over judgments within the same term of Court the final judgment entered in this action was rendered in chambers pursuant to O.C.G.A. § 9-11-55(a). This Court never exercised any legal discretion to vacate its final judgment nor did the Court give the Plaintiffs any meritorious reasons for vacating the final judgment. See, Docket No. 11 Order vacating judgment. Our Georgia Supreme Court has made it clear in *Pope v. Pope*, 277 Ga. 333, 588 SE2d 736 (2003) by stating the following:

> "A trial court's discretion in setting aside a judgment will not be disturbed unless manifestly abused. However, trial Court's discretion to set aside a judgment during the term it was entered is not without limits, and should be exercised for some meritorious reason."

Thus the Order attempting to vacate the final judgment in this manner did not show that the Court exercised any legal discretion by showing a meritorious reason. The Georgia Supreme Court has also held in *Hurt Bldg., Inc. v. Atlanta Trust Co.*, 181 Ga. 274, 182 SE 187 (1935) that:

> "While a motion to set aside a judgment a judgment is addressed to the sound discretion of the judge,

> it should not, although made during the term at which the judgment was rendered, be granted unless some meritorious reason is given thereof. The rule appears to have been generally adopted in almost all jurisdictions, that the power of control even during the term should be exercised only upon sufficient cause shown, and where the matter appeals to an exercise of sound legal discretion."

As stated herein the final judgment entered on January 28th, 2005 limited this Court's own power and jurisdiction to amend, modify or set aside the final judgment by first giving the Plaintiffs the right to a notice of a hearing and a right to be heard prior to the Court vacating or setting aside the final judgment of this Court. See, Docket No. 10 Final Judgment at Page 12 which reads in part that:

> "IT IS FURTHER ORDERED, That the Plaintiffs has consented to the total payment and satisfaction of this judgment to be made payable to the Plaintiff T.L. Ware Bottling Company, Inc., by the Defendant. Furthermore, this consent final judgment shall not be amended, modified or set aside by the parties or the Court without the consent of the parties Plaintiffs or without a notice of a hearing to the Plaintiffs by the Clerk of this Court at the Plaintiffs' address of record in this action."

III. CONCLUSION OF LAW

This provision of the final judgment was binding on this Court. Therefore, the Court concludes that there are no meritorious reasons to vacate the final judgment entered on January 28th, 2005 and the Order vacating such final judgment without notice to the Plaintiffs and without their consent pursuant to the above stated provision of the final judgment is deemed void on its face for lack of jurisdiction. The Georgia Supreme Court has further held that:

> "A void judgment is no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceeding founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void."

See, *Steward vs. Golden*, 98 Ga. 479, 25 SE 538 (1896) and also see *Shotgun vs. State*, 73 Ga. App. 136, 35 SE2d 556 (1945) cert. denied, 329 U.S. 740, 67 S.Ct. 56, 91 L.Ed 638 (1946). See, O.C.G.A. § 9-11-60(a) and O.C.G.A. § 9-12-16. The Georgia Supreme Court has made it clear by stating:

> "When a party has been afforded an opportunity to be heard, the court cannot suspend or vacate its judgment merely to let in a defense which should have been offered before the judgment was entered."

See, *Hurt Bldg., Inc. v. Atlanta Trust Co.*, Supra. This Court further concludes that the Order vacating the final judgment without having a meritorious reason and without notice to the Plaintiffs prior

to vacating the final judgment violates the Plaintiffs Federal Constitutional rights to due process under law. Therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED, That the Order vacating the final judgment entered on February 2nd, 2005 is hereby set aside and vacated and said order is deemed null and void on its face for lack of jurisdiction and because of a nonamendable defect which appears on the face of the record such as lack of notice of a hearing to the Plaintiffs concerning the Court's own motion to vacate the final judgment without having a meritorious reason.

IT IS FURTHER ORDERED, By this Court that the final judgment entered on January 28th, 2005 by the Honorable M. Gino Brogdon is effective and binding on this Court and all parties and is therefore the law of this case.

IT IS FURTHER ORDERED, By this Court that the Defendant and the Clerk of this Court is further directed to comply with all of the terms of the final judgment entered on January 28th, 2005 by the Honorable M. Gino Brogdon, Presiding Judge and that any further orders or judgments (except any orders of the Georgia Supreme Court or the Georgia Court of Appeals) which is entered in violation of the final judgment shall be deemed null and void as a matter of law.

IT IS FURTHER ORDERED, By this Court that this order shall be made part of the final judgment of this Court and shall not be vacated or set aside by the Court without prior notice of a hearing to the Plaintiffs. The Plaintiffs shall have a right to file a motion for

contempt for any persons violating this Order and the final judgment entered on January 28th, 2005 by this Court.

IT IS SO ORDERED, This 7TH day of February 2005.

Jerry W. Baxter /s/

Hon. JERRY W. BAXTER, Presiding Judge
SUPERIOR COURT OF FULTON COUNTY

IT IS HEREBY AGREED TO BY THE PARTIES,

Agreed and Consented to By:

Michael R. Johnson, Sr. /s/

Michael R. Johnson, Sr.
Attorney for the Plaintiff
Georgia Bar No. 395056
Johnson & Associates, P. C.
340 West Peachtree Street, N.E.
Suite 200
Atlanta, Georgia 30308
(404) 688-7100

Agreed and Consented to By:

Tony L. Ware, /s/

Tony L. Ware, JD, Plaintiff
Chairman & CEO
P.O. Box 150524-Dept. 0227
Atlanta, Georgia 30315-0188
(404) 945-0342

APPENDEX 25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TONY L. WARE, CEO and TL WARE BOTTLING CO., INC.,	: FILED IN CLERK'S OFFICE
	: CIVIL ACTION NO.
Plaintiffs,	: 1:05-CV-426-MHS
FLEETBOSTON FINANCIAL CORPORATION f/k/a BankBoston Corporation.	:
Defendant.	:

ORDER

This action is before the Court on defendant's Rule 12(b) motion to dismiss complaint; Rule 60(b) motion to set aside orders; and motion for protective order or, alternatively, to deem admissions withdrawn . Also before the Court is plaintiffs' motion to dismiss and remand case.[1] For the following reasons, the Court denies plaintiffs motion; grants defendant's motions to dismiss complaint and to set aside orders; denies as moot defendant's motion for protective order or, alternatively, to deem admissions withdrawn; dismisses this action with prejudice ; and orders plaintiff Tony L. Ware and his attorney,

[1] On May 11, 2005, plaintiffs filed a "revised" motion to dismiss and remand case. Defendant moves to strike the revised motion on the grounds that it raises arguments regarding defects in removal that are time-barred under 28 U .S.C. § 1447(c) and otherwise consists of a rehash of plaintiffs' previous arguments. The Court agrees. Accordingly, the Court grants defendant's motion to strike the revised motion and its supporting papers.

Michael R . Johnson, Sr., to show cause why the Court should not impose sanctions on them for filing a frivolous lawsuit and engaging in fraudulent and abusive litigation tactics.

Background

In 1994, plaintiff Tony L. Ware sued Fidelity Acceptance Corporation, Fidelity Financial Services, Inc., Admiral Life Insurance Company, and Martin L. Lane in the Superior Court of Fulton County for damages stemming from the defendants' alleged illegal repossession of Ware's automobile. Following the presentation of Ware's evidence at trial, the trial court directed a verdict in favor of the first three defendants and dismissed defendant Lane for insufficient service of process. Ware appealed, and the Georgia Court of Appeals affirmed. See Ware v. Fidelity Acceptance Corp., 225 Ga. App. 41(1997).

On December 7, 2004, more than ten years after filing the first suit, Tony L. Ware, along with T .L Ware Bottling Co., Inc.,[2] filed this action in the Superior Court of Fulton County against defendant FleetBoston Financial Corporation (FleetBoston), alleged successor to BankBoston Corporation, asserting claims arising out of the same allegedly illegal repossession of Ware's automobile. In this case, plaintiffs

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[2] According to records of the Georgia Secretary of State, T .L. Ware Bottling Co., Inc., was administratively dissolved effective November 9, 2002, more than two years before this action was filed. (Def.'s First Supplemental App., Ex. U.) Therefore, T.L. Ware Bottling Co., Inc., lacks capacity to prosecute this action, and all claims brought in its name must be dismissed. See Gas Pump, Inc. v. General Cinema Beverages of N. Fla. Inc., 12 F.3d 181, 182 (11th Cir . 1994)(under Georgia law, two years after administrative dissolution of corporation, its demise is complete and it may no longer initiate any activity, including the bringing of lawsuits).

allege that the entities responsible for the repossession were subsidiaries and/or agents of FleetBoston, which is therefore liable for their allegedly wrongful acts.[3]

On December 10, 2004, plaintiff Ware attempted to send FleetBoston a summons, a copy of the complaint, and plaintiffs' requests for admissions via certified mail. However, the package was incorrectly addressed.[4] As a result, the package was returned to plaintiff Ware on December 20, 2004, marked "Addressee Unknown."[5] Notwithstanding the fact that the

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[3] Evidence submitted by FleetBoston shows that, in fact, it never had any relationship with any of the other entities identified in plaintiffs' complaint. To the contrary, the evidence shows that defendant was organized under Delaware law in 1999 as a mere "placeholder corporation" ; that it was registered to do business in a number of states, including Georgia, but never transacted any business and never held assets of any significant value ; and that in July 2004 it was dissolved and its registration to do business in Georgia was withdrawn . (Francis Aff. ¶¶ 4-5 .)

[4] Plaintiff addressed the package to "Mr . M. A. Ferucci, CEO, 50 Kennedy Plaza, 16th Floor, Providence, RI 02903." Mr. Ferucci, however, was no longer FleetBoston's CEO . (Second Francis Aff. 15.) More significantly, corporate records attached to plaintiffs' complaint showed that Mr . Ferucci's address was 1209 N. Orange Street, Wilmington, Delaware. (Compl., Ex. A.) The same records also listed FleetBoston's legal service address as "Rebecca Francis, Bank of America, 50 Kennedy Plaza, 16th Floor, Providence, RI 02903." (Id. Despite having this information in his possession, plaintiff Ware addressed the service package to Mr. Ferucci instead of Ms. Francis and did not include either Bank of America's name or FleetBoston's name in the address.

[5] This fact is established by U.S. Postal Service records ubmitted by defendant, which show that plaintiff Ware signed for the returned package at 1:55 p.m. on December 20, 2004. (Sanabria Aff., Ex . 2 & 3 .)

service package had been returned to him as undeliverable, just three days later, on December 23, 2004, plaintiff Ware executed an Affidavit of Service of Process in which he certified, under oath, that he had personally served defendant on December 10, 2004.

On January 14, 2005, plaintiffs filed Ware's Affidavit of Service of Process with the superior court. On the same day, plaintiffs filed a Return of Service of Process executed by a process server. The process server attested that he had served defendant on December 10, 2004, by delivering a copy of the summons, complaint, and requests for admissions to the Georgia Secretary of State. On January 27, 2005, plaintiffs filed a "Certificate of Default" in which plaintiff Ware stated, under oath, that defendant had been served on December 10, 2004, by a court appointed process server and was in default.

The following day, January 28, 2005, plaintiffs obtained the signature of Judge Gino M . Brogdon, presiding judge for the week, on a proposed Final Judgment and Decree (the Brogdon Order). The Brogdon Order purported on its face to have been "agreed to by the parties," although it was signed only by plaintiff Ware and his attorney, Michael R . Johnson, Sr. Among other things, the Brogdon Order awarded plaintiffs a default judgment against FleetBoston in the total amount of $922,267,265.24.

On February 2, 2005, Judge Bensonetta Tipton Lane, to whom this case was assigned, entered an Order sua snonte vacating the Brogdon Order and specially setting a hearing on plaintiffs' motion for default judgment for February 16, 2005 (the Lane Order). However, on February 7, 2005, plaintiffs obtained the signature of then-presiding Judge Jerry W. Baxter on another purported consent Order, which vacated the Lane Order and reinstated the Brogdon Order (the Baxter Order).

Like the Brogdon Order, the Baxter Order recited that it had been "consented to by the parties," although it was signed only by plaintiff Ware and his attorney. According to Judge Baxter, he was told by the presenters of the Order that it had been agreed to by all parties, plaintiffs and defendant. For that reason, Judge Baxter did not review the Order before signing it. Had he known the Order was not consented to by defendant, Judge Baxter would not have signed it.[6] (Baxter Aff. ¶¶ 4, 7-8.).

On February 8, 2005, plaintiffs filed a Notice of Appeal from the reinstated Brogdon Order. This was apparently done in order to divest Judge Lane of jurisdiction over the case, since there appears to be no other reason for plaintiffs to appeal from a Final Judgment and Decree that they themselves drafted and that afforded them all the relief they were seeking . Plaintiffs, however, failed to perfect the appeal by paying the appellate costs set by the superior court.

Meanwhile, defendant finally learned of the pendency of this action when it received copies of the Brogdon Order and the Lane Order that had been mailed from Judge Lane's chambers on February 3, 2005. On February 8, 2005, defendant retained counsel, who reviewed the Orders and then obtained

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[6] Plaintiffs' counsel claims that neither he nor plaintiff Ware personally spoke with Judge Baxter or told him that defendant had consented to the Order. (Johnson Aff. 13.) Regardless, the Order prominently stated just below the judge's signature line that it had been consented to by "the parties," not just plaintiffs. Moreover, it is absurd to suggest that Judge Baxter would have knowingly entered such an Order unless he believed it was by consent. It is also absurd to argue, as does plaintiffs' counsel, that Judge Baxter's affidavit was obtained through an improper ex party communication. Id. ¶ 6.) Judge Baxter is not the judge assigned to this case. Therefore, it was not improper for defendant to contact Judge Baxter to obtain an affidavit confirming plaintiffs' fraudulent procurement of the Baxter Order.

copies of the pleadings on file in this case from the Clerk of the Superior Court of Fulton County. On February 15, 2005, defendant removed the case to this Court.

Discussion

Defendant moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), 12(b)(5), and 12(b)(2) for failure to state a claim on which relief can be granted, insufficiency of service of process, and lack of personal jurisdiction. First, defendant argues that the complaint fails to state a claim on which relief can be granted because plaintiff's claims arose in 1994 and were the subject of a previously adjudicated action and are therefore barred by collateral estoppel, res judicata, and the applicable statutes of limitations. Second, defendant argues that the complaint should be dismissed because it has never been properly served with process. Third, defendant contends that this Court lacks personal jurisdiction over it because it has never conducted or solicited business in Georgia.

Defendant also moves pursuant to Fed. R. Civ. P. 60(b)(3) and 60(b)(4) to set aside the Brogdon Order and the Baxter Order. Defendant contends that these Orders should be vacated because the evidence establishes that they were procured by fraud, misrepresentation, and other misconduct of plaintiffs and were entered without due process.

In addition, defendant moves for a protective order relieving it from having to respond to plaintiffs' requests for admissions or, in the alternative, deeming any admissions withdrawn. Defendant argues that the Court should stay any obligation to respond to the requests because they were never properly served and, under this Court's rules, were premature. If the Court deems the requests already admitted, defendant argues, then such admissions should now be deemed withdrawn because the requests were improper, and withdrawing them will

allow the case to be decided on the merits and will not unfairly prejudice plaintiffs .

Finally, in connection with its motions to dismiss and to set aside Orders, defendant asks the Court to impose sanctions on plaintiffs and their attorney. Defendant argues that plaintiffs filed a frivolous complaint that is patently devoid of any legal merit, then used fraud and misrepresentations to obtain an illegal default judgment, and then compounded their wrongdoing by fraudulently obtaining an Order setting aside an Order vacating that illegal judgment. Without specifying any particular sanction, defendant asks the Court to "apply the strongest sanctions available to Plaintiffs and their counsel." (Br . in Supp . of Def.'s Rule 12(b) Mot . to Dismiss Compl. at 25 ; Br . in Supp. of Def.'s Rule 60(b) Mot . to Set Aside Orders at 20.)

In response, plaintiffs have filed a motion to remand this case to state court.[7] In support of their motion, plaintiffs contend that the real defendant in this action is a Rhode Island corporation known as FleetBoston Financial Corporation, not the Delaware corporation of the same name that removed this case. Based on this theory, plaintiffs have filed an Amended Affidavit of Service of Process and an Amended Return of Service of Process purporting to show that both the Rhode Island and Delaware corporations were properly served on December 10, 2004, by certified mail - notwithstanding the fact that the service package was returned as undeliverable - and by delivery of the summons and complaint to the Georgia Secretary of State. Based on this alleged service, plaintiffs argue that defendant's notice of removal was untimely.

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[7] Although styled as a "Motion to Dismiss and Remand," the only relief sought by plaintiffs is a remand to the Superior Court of Fulton County.

Plaintiffs also argue that only the Rhode Island corporation, the intended defendant, had the right to remove this action and that the Delaware corporation's removal was therefore improper. In addition, plaintiffs contend that this Court lacks removal jurisdiction because neither a federal question nor diversity of citizenship is present. Also, plaintiffs argue that the notice of appeal filed in the state court divested that court of jurisdiction before the notice of removal was filed, thus preventing removal. Finally, plaintiffs argue that defendant was barred from removing this action without first obtaining a new certificate of authority from the Georgia Secretary of State. Other than their motion to remand, plaintiffs have filed no response to defendant's motions.

The Court concludes that plaintiffs' arguments are frivolous and that defendant's motions to dismiss the complaint and to set aside the Brogdon and Baxter Orders should be granted. First, plaintiffs' new service allegation - that they meant to serve and did serve a completely different defendant - is totally without merit. The Delaware corporation known as FleetBoston Financial Corporation (FleetBoston of Delaware) is the entity that plaintiffs specifically alleged in their complaint was the defendant, as evidenced by the Georgia and Delaware Secretary of State records attached to the complaint, which specifically identify the Delaware corporation. (Compl., Ex. A.).

The evidence shows that the Rhode Island corporation also known as FleetBoston Financial Corporation (FleetBoston of Rhode Island), which plaintiffs now claim was the intended defendant in this action, was a bank holding company that had its principal place of business in Boston, Massachusetts, before it was merged into Bank of America Corporation in April 2004. FleetBoston of Rhode Island was never registered to do business in Georgia and thus does not fit plaintiffs' description

of defendant in this action "as a foreign corporation withdrawn from doing business in this state."[8] (Compl. 14.) Since the complaint clearly named only FleetBoston of Delaware as defendant, no action by or consent of FleetBoston of Rhode Island was required to permit removal.

Plaintiffs' argument that defendant's use of the same name as the Rhode Island corporation misled them and violated O .C .G.A. § 14-4-22 is also without merit. First, as evidenced by the ample public documents obtained Plaintiffs' argument that defendant's use of the same name as the Rhode Island corporation misled them and violated O.C.G.A. § 14-4 22 is also without merit. First, as evidenced by the ample public documents obtained

Regardless of the identity of defendant, it is indisputable that plaintiffs never properly served any defendant. Plaintiffs contend that they perfected service pursuant to O .C .G.A. § 14-2-1520 by delivering a copy of the initial pleadings to the Georgia Secretary of State. This argument is without merit because, in addition to delivering the documents to the Secretary of State, plaintiffs were required to mail a copy of their papers to a person of authority at the address identified in defendant's certificate of withdrawal. O.C.G.A. § 14-2-1520(c). This they failed to do, instead mailing a misaddressed package to defendant's former CEO, which was returned as undeliverable. Plaintiffs' failure to strictly comply with the statutory requirements for service on a corporation rendered the

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[8] Plaintiffs apparently theorize that the Rhode Island corporation is the successor of another corporation named Fleet Financial Corporation of Rhode Island, which withdrew its registration to do business in Georgia in 1983. The evidence, however, shows that there is no connection between these two corporations, and that, in fact, Fleet Financial Corporation of Rhode Island continues to exist as a separate Rhode Island corporation today. (Third Francis Aff. ¶¶ 8-9).

attempted service defective. See Howard v. Technosystems Consol. Corn., 244 Ga. App. 767, 769 (2000).

Furthermore, after return of the package, plaintiffs took no further steps to ascertain defendant's correct address or to have process delivered. Under these circumstances, the attempted service was insufficient as a matter of law. See Howard v. Jenny's Country Kitchen Inc., 223 F.R.D. 559, 565 (D. Kan. 2004). Even more importantly, the dictates of due process do not permit service to be perfected merely by delivering pleadings to a Secretary of State where, as here, the statute does not require the Secretary of State to mail notice to the defendant. Wuchter v. Puzzutti, 276 U.S. 13, 18-20 (1928)(holding that state statute allowing defendant to be served by serving Secretary of State , without more , violates due process); see also Delta Int'l Mach. Corp. v. Plunk, 190 Ga . App. 269, 270-71 (1989)(holding that service under a similar statute is not complete until Secretary of State sends a copy to defendant).

Even if service on the Secretary of State had been effective, defendant's removal of this action would still have been timely. A notice of removal must be filed "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." 28 U.S.C. § 1446(b). The critical date is the date of "receipt." Thus, where service may be effected by delivery of the initial pleading to the Secretary of State, "the time for removal does not run as of the date of the statutory service on the Secretary of State of Georgia, but as of the time when the defendant actually receives a copy of the initial pleading." Barber v. Willie, 246 F. Supp. 814, 815 (N .D. Ga . 1965). In this case, defendant's time for removal did not begin to run until February 8, 2005, the date it first received a copy of the complaint. On February 1 5, 2005, well within the thirty day statutory period, defendant removed the action to this Court. Such removal was therefore timely.

The Court also clearly has subject matter jurisdiction over this case. As alleged in the complaint, this action involves a controversy between citizens of different states and the amount in controversy well exceeds $75,000. (Compl. ¶¶ 2-4, Prayer for Relief.) Consequently, this Court has diversity jurisdiction pursuant to 28 U.S .C . § 1332. In addition, because plaintiffs' complaint asserts claims arising under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U .S .C. §§ 1961 et seq . (Compl . ¶¶ 27-35), and the Trade Secrets Act, 18 U.S.C. § 1832 id. ¶ 38), this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. Therefore, removall was proper pursuant to 28 U .S .C. § 1441(a) and (b).

Plaintiffs' contention that defendant's removal of this action was improper because the state court action is on appeal to the Georgia Supreme Court is without any factual or legal support. First, affidavits from the Office of the Clerk of Court for the Fulton County Superior Court, Appeals Division, and the Clerk of the Georgia Supreme Court confirm that the state court action is not on appeal and was not on appeal at the time of removal. (Def.'s First Supplemental App., Exs. S & T.). Second, defendant could have removed the state court action to this Court even if an appeal had been pending. See Jackson v. American Savings Mortgage Corp., 924 F. 2d 195, 197, 98 (11th Cir. 1991)(removal filed same day as notice of appeal) ; see also In re Savers Fed. Sav. & Loan Assoc., 872 F .2d 963, 965-66 (11th Cir. 1989)(removal filed after entry of final judgment in state court and before period for appeal had elapsed).

Finally, plaintiffs' argument based on O.C.G.A. § 14-2-1502 that defendant cannot defend this action without first obtaining a certificate of authority is frivolous . First, the statute only applies to foreign corporations transacting business in Georgia, O .C .G.A. § 14-2-1502(a), and the evidence shows that defendant has never transacted business in Georgia. Second, the statute itself directly contradicts plaintiffs'

argument, expressly providing that "the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state" O.C.G.A. § 14-2-1502(d)(emphasis supplied).

The Court now turns to defendant's motions, to which plaintiffs have filed no response. With regard to defendant's motion to dismiss, the Court concludes that plaintiffs' complaint should be dismissed with prejudice for failure to state a claim on which relief can be granted. All of the claims asserted in plaintiffs' complaint were or could have been litigated in the previously adjudicated action brought by plaintiff Ware. Furthermore, all of plaintiffs' claims against defendant in this action are premised upon alleged privity between defendant and the defendants in the prior action. Consequently, plaintiffs' claims are all barred by the doctrines of res judicata and collateral estoppel. See Waldroup V. Greene County, Hosp. Auth., 26 5 Ga. 864, 865-67 (1995).

In addition, all of plaintiffs' claims arise from an automobile lease financing agreement consummated in March 1993 and terminated by repossession of the automobile in June 1994. Consequently, all of plaintiffs' claims are barred by the applicable statutes of limitations. Plaintiffs' Georgia and federal RICO claims are barred, respectively, by five-year and four-year statutes of limitations. O.C.G.A. § 16-14-8; Agencv Holding Corp. v. Malley- Duff & Assocs., Inc., 483 U.S. 143, 156 (1987). Plaintiffs' claims for fraud, misrepresentation, trespass, negligence, conspiracy, and theft by deception are all barred by four-year statutes of limitations. O.C.G.A. §§ 9-3-31 and 9-3-32. Plaintiffs' claims for violation of Georgia's Fair Business Practices Act are barred by a two-year statute of limitations. O.C.G.A. § 10-1-401. Consequently, even apart

from the bar arising from the adjudication of the previous lawsuit, all of plaintiffs' claims are absolutely time-barred.[9]

As for defendant's motion to set aside the Brogdon and Baxter Orders, this Court clearly has jurisdiction to reconsider and set aside those Orders if appropriate. See Maseda v . Honda Motor Co., 861 F.2d 1248, 1252 (11th Cir. 1985)("[A] federal district court may dissolve or modify injunction, orders, and all other proceedings which have taken place in state court prior to removal"). The Court may set aside a judgment or order due to "fraud., misrepresentation, or other misconduct of an adverse party," or if "the judgment is void ." Fed. R. Civ . P. 60(b)(3) and (4).

The evidence presented by defendant clearly establishes that both the Brogdon Order and the Baxter Order were procured by plaintiffs and their counsel through fraud and misrepresentation. First, plaintiffs misrepresented to the state court that defendant had been properly served and was in default. Second, plaintiffs misrepresented to both Judge Brogdon and Judge Baxter that the Orders had been consented to by all parties. The evidence further establishes that the default judgment entered by the Brogdon Order and reinstated by the Baxter Order is void because defendant was not properly served and thus had no notice of the proceedings, and because the Court lacks personal jurisdiction over defendant.

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[9] Since this action is clearly barred by res judicata, collateral estoppel, and the applicable statutes of limitations, the Court need not address defendant's additional contentions that dismissal is appropriate on the grounds of insufficiency of service of process and lack of personal jurisdiction. However, the Court notes that the record conclusively establishes that defendant was never properly served with process and lacks the minimum contacts with this forum required to support personal jurisdiction.

Accordingly, the Court grants defendant's motion to set aside the Brogdon and Baxter Orders.

With respect to defendant's motion for a protective order relieving it of the obligation of responding to plaintiffs' requests for admissions or, alternatively, deeming any admissions withdrawn, the Court concludes that the motion has been rendered moot by its rulings on defendant's other motions. In any event, the Court finds that the requests were improper in that they sought admissions that would have prevented defendant from presenting meritorious defenses to plaintiffs' claims, including the defenses of insufficiency of service of process and lack of personal jurisdiction. In addition, defendant was never under any obligation to respond to the requests because they were never properly served; therefore, none of the matters that were the subject of the requests was ever admitted by defendant. Finally, the Court turns to the question of sanctions. The Court finds that the conduct of plaintiff Ware and his attorney, Michael R. Johnson, Sr., warrants the imposition of sanctions. First, the evidence shows that Ware and Johnson filed this lawsuit,[10] which is without any legal merit whatsoever and is patently frivolous on its face. Second, Ware and Johnson falsely represented to the Court that defendant had been properly served and was in default. Third, Ware and Johnson falsely represented to two judges of the Fulton County Superior Court that Orders submitted to them had been consented to by all parties.

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[10] Both Ware and Johnson signed the complaint. Johnson is an attorney admitted to practice in Georgia. Although Ware identifies himself as the holder of (continued ...) a J.D. degree, his name does not appear in the directory of attorneys admitted to practice in Georgia.

Through this egregious course of misconduct, Ware and Johnson fraudulently obtained a default judgment against defendant in excess of $900 million. Once defendant became aware of this lawsuit and the entry of the default judgment, it was put to significant trouble and expense in responding to plaintiffs' frivolous claims and in seeking to have the fraudulently obtained default judgment set aside. In addition, this Court and its staff have been required to expend considerable time and resources on an action that should never have been filed.

Particularly disturbing to the Court, apart from Ware's and Johnson's misconduct in this case, is a pattern of such conduct by Ware over a period of many years.[11] Beginning at least as early as the previously adjudicated case underlying this action, Ware has demonstrated a predilection for frivolous and abusive litigation. In the previous case, Ware, proceeding pro se, raised a number of frivolous arguments on appeal, each of which the court of appeals found to be totally without merit. See Ware v. Fidelity Acceptance Cam., 225 Ga. App. 41, 42-44 (1997).

In an appeal in another case brought by Ware, the Georgia Court of Appeals found the "appeal and the entire appeal procedures used by Ware to be wholly and egregiously frivolous and abusive," and found "that the appeal has been litigiously pursued for the purpose of harassment." Ware v. Vaughn, 225 Ga. App. 303, 306 (1997). In addition to imposing a monetary penalty on Ware, the court directed "that the matters and proceedings and actions stated herein be

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[11] Equally, if not more, disturbing is Ware's invocation of divine authority for his frivolous and abusive litigation tactics and his veiled threats of divine retribution against anyone who stands in his way. See "Statements by Tony L. Ware from the Holy Ghost," filed March 15, 2005.

considered cumulative and aggravating circumstances to any further and future action by Tony L. Ware which this Court deems to be improper, frivolous, abusive, or excessive litigation." Id.

In other cases brought by Ware, he has employed abusive litigation tactics very similar to those employed in this case. In Ware v. Handy Storage, 222 Ga. App . 339 (1996), Ware, once again proceeding fro se, sought to obtain a $14,000,000 default judgment against the defendant after serving process on the Georgia Secretary of State. In Ware v. Bonner, 585 S.E. 2d 621 (Ga. 2003), Ware, represented this time by Johnson, sued Superior Court Judge Alice D. Bonner after she refused to grant motions for default judgment in an action Ware brought against Microsoft Corporation seeking in excess of $1 billion in damages.

This Court cannot and will not tolerate the type of abusive litigation tactics employed by plaintiff Ware and his attorney in this action. The fact that Ware has frequently engaged in similar misconduct in the past underscores the need to impose appropriate sanctions in this case. If such conduct is allowed to go unpunished and undeterred, it is all the more likely to be repeated in the future.

Therefore, pursuant to the authority granted under Rule 11 of the Federal Rules of Civil Procedure, 28 U .S .C. § 1927, and this Court's inherent authority to impose sanctions for bad faith conduct, the Court orders plaintiff Ware and his attorney, Michael R . Johnson, Sr., to show cause in writing within thirty (30) days of the date of entry of this order why sanctions should not be imposed on them . Defendant shall have ten (10) days after service of Ware's and Johnson's answer to file a response.

One sanction the Court will consider is an order requiring payment of some or all of defendant's expenses incurred in responding to this lawsuit, including its reasonable

attorneys' fees. Therefore, the Court directs defendant to submit within (30) days of the date of entry of this order a sworn statement of the total amount of expenses it has incurred in connection with this lawsuit, including its reasonable attorneys' fees. Plaintiffs shall have ten (10) days from the date of service of defendant's statement to file a response.

Before fixing the appropriate amount of any sanctions, it is necessary for the Court to consider Ware's and Johnson's ability to pay. Therefore, the Court orders plaintiff Ware and attorney Johnson each to submit to the Court within thirty (30) days of the date of entry of this order a sworn statement of their current financial condition, including a complete listing of their current income, assets, and liabilities . Defendant shall have ten (10) days from the date of service of Ware's and Johnson's statements to file a response. If necessary, the Court will allow defendant to conduct discovery on this issue.

Summary

For the foregoing reasons, the Court DENIES plaintiffs' motion to dismiss and remand case [#lI-1, #11-2]; GRANTS defendant's motion to strike revised motion to dismiss and remand case [#22-1] ; STRIKES plaintiffs' revised motion to dismiss and remand case [#21-1,421-21]; GRANTS defendant's Rule12(b) motion to dismiss complaint [#2-1]; GRANTS defendant's Rule 60(b) motion to set aside orders [#8-1]; DENIES AS MOOT defendant's motion for protective order or, alternatively, to deem admissions withdrawn [#1 0-1, #10-21] VACATES the Orders entered in this action on January 28, 2005, by Fulton County Superior Court Judge Gino M . Brogdon, and on February 7, 2005, by Fulton County Superior Court Judge Jerry W. Baxter; and DISMISSES WITH PREJUDICE plaintiffs' complaint.

Within thirty (30) days of the date of entry of this order, the Court ORDERS plaintiff Ware and his attorney, Michael R . Johnson, Sr., to show cause in writing why the Court should not

impose sanctions on them; DIRECTS defendant to submit a sworn statement of the amount of expenses incurred in connection with this matter, including its reasonable attorneys' fees; and ORDERS plaintiff Ware and attorney Johnson each to submit a sworn statement of their financial condition, including a complete listing of their current income, assets, and liabilities . Plaintiffs and defendant shall each have ten (10) days after service of each of the foregoing to file a response. The Court DIRECTS the Clerk to resubmit this case after expiration of the foregoing time periods.

IT IS SO ORDERED This 26th, day of May 2006.

/s/ Marvin H. Shoob, Senior District Judge
United State District Court
Northern District of Georgia

APPENDEX 43

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRUCIT

No. 05-13565
Non-Argument Calendar

D. C. Docket No. 05-00426-CV-MHS-1

TONY L. WARE, CEO
T.L. WARE BOTTLING COMPANY, INC.

Plaintiffs-Appellants

versus

FLEETBOSTON FINANCIAL CORP.,
f.k.a. BankBoston Corp.

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

Before ANDERSON, BIRCH and WILSON, Circuit Judges.

PER CURIAM:

APPENDEX 44

Tony L. Ware, proceeding pro se, and T.L. Ware Bottling Co., Inc.[12] ("Ware Bottling"), through counsel, (collectively referred to as "Ware") appeal from the district court's orders granting FleetBoston Financial Corporation's ("FleetBoston") Federal Rule of Civil Procedure 12(b) motion to dismiss and Federal Rule of Civil Procedure 60(b) motion to set aside orders, and denying Ware's motion to remand.[13] On appeal, Ware argues that the district court did not have jurisdiction under the *Rooker-Feldman* doctrine, the state action was not removable because it was pending appeal in the state's highest court, FleetBoston did not have the capacity to remove the action because it was a dissolved corporation and as such could not suffer any injury in fact, and FleetBoston did not timely remove the action.

Upon review of the record, and upon consideration of the briefs of the parties, we discern no reversible error.

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[12] Ware Bottling concedes that it was administratively dissolved at one time, but argues that according to Ga. Code Ann. § 14-2-1409(c), its corporate status was returned to active or good standing with the Georgia Secretary of State because it was reinstated on April 22, 2005, before the district court entered the final orders at issue. Nevertheless, it is not necessary to address this issue here because, even if Ware Bottling was improperly dismissed in accordance with § 14-2-1409(c), we affirm the district court, for reasons set forth, infra.

[13] FleetBoston moved to dismiss under Rule 12(b)(6), but attached documents outside the pleadings in support thereof, which the district court considered in its order. Although this might have triggered the conversion provision of Rule 12(b)(6) and the Rule 56 requirements for notice and special attention to pro se litigants, we find that the district court's reliance upon facts outside of Ware's complaint was harmless. *See* Artistic Entm't, Inc. v. City of Warner Robins, 331 F.3d 1196, 1202 (11th Cir. 2003) (per curiam).

We review whether the district court had removal jurisdiction de novo. Henson v. Ciba-Geigy Corp., 261 F.3d 1065, 1068 (11th Cir. 2001) (per curiam), *aff'd sub nom.*, Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002).

Federal law governing removal of actions in pending state courts provides in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a).

In Jackson v. American Sav. Mortgage Corp., 924 F.2d 195, 197 (11th Cir. 1991), we reviewed the removal of a case which took [*4] place on the same day that the state court plaintiff filed a notice of appeal in the state supreme court. We concluded, without specifically addressing the issue, that the case was removable under § 1441(a) notwithstanding the notice of appeal. Id. Further, in In re Savers Fed. Sav. & Loan Ass'n, 872 F.2d 963, 965-66 (11th Cir. 1989) (per curiam), we addressed the issue squarely and confirmed that, depending on the circumstances, a state action in which a final judgment had been entered could be removed to federal district court.

The record shows that, in fact, there was no pending appeal in the Supreme Court of Georgia. Even if the state action was pending appeal, however, FleetBoston could have removed the state action to this Court. *See* Jackson, 924 F.2d at 197. Furthermore, the fact that a final judgment was entered in state court does not preclude removal in this instance. *See* In re Savers Federal Sav. & Loan Ass'n, 872 F.2d at 965-66. Accordingly, we affirm in this respect.

II.

As noted above, 28 U.S.C. § 1441(a) permits a defendant to remove any civil action brought in a state court of which [*5] the district courts of the United States have original jurisdiction. "The right of removal is statutory; before a party may avail himself of it, he must show that he comes within the provisions of the statute." Edwards v. E.I. Du Pont De Nemours & Co., 183 F.2d 165, 168 (5th Cir. 1950).

In Groom v. Mortimer Land Co., 192 F. 849, 851 (5th Cir. 1912), the court applied a New Jersey statute that perpetuated the existence of a dissolved corporation for the purpose of defending against lawsuits. The Fifth Circuit held that the dissolved corporation could remove the case from state to federal court. Id. A similar Georgia statute provides that a foreign, withdrawn corporation may defend itself against any proceeding even without a certificate of authority. Ga. Code Ann. § 14-2-1502(d).

Even though FleetBoston was dissolved and did not have a certificate of authority, it had the power to remove the state action to federal district court. Accordingly, we affirm in this respect.

III.

According to 28 U.S.C. § 1446(b), "the notice of removal of a civil action . . . shall be filed within thirty [*6] days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ." Section 1446(b)(the timeliness requirement), is an express statutory requirement for removal and the failure to comply "can fairly be said to render the removal 'defective' and justify a remand pursuant to § 1447(c)." Snapper, Inc. v. Redan, 171 F.3d 1249, 1253 (11th Cir. 1999).

The United States Supreme Court has held that a "defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48, 119 S. Ct. 1322, 1325, 143 L. Ed. 2d 448 (1999).

Georgia law provides that:

> process shall be served by the sheriff of the county where the action is brought or where the defendant is found, or by such sheriff's deputy, or by the marshal or sheriff of the court, or by such official's [*7] deputy, or by any citizen of the United States specially appointed by the court for that purpose, or by someone who is not a party and is not younger than 18 years of age and has been appointed as a permanent process server by the court in which the action is brought.
> Ga. Code Ann. § 9-11-4(c).

Georgia law further provides that: "after the withdrawal of [a foreign] corporation is effective, service of process on the

Secretary of State . . . is service on the [foreign] corporation." Ga. Code Ann. § 14-2-1520(c). Further, "any party that serves process upon the Secretary of State . . . shall also mail a copy of the process to the chief executive officer, chief financial officer, the secretary of the foreign corporation, or a person holding a comparable position at the mailing address set forth [in the certificate of withdrawal]." *Id.*

The United States Supreme Court, however, has held that a state statute that allows a defendant to be served by serving the state secretary of state, without more, violates due process. Wuchter v. Pizzutti, 276 U.S. 13, 21, 48 S. Ct. 259, 261, 72 L. Ed. 446 (1928). [*8] Further, in the context of serving a foreign corporation authorized to transact business in the state of Georgia, the failure to comply strictly with the statutory requirements for service on such corporation renders the attempted service defective. Howard v. Technosystems Consol. Corp., 244 Ga. App. 767, 536 S.E. 2d 753, 756 (Ga. Ct. App. 2000).

Ware did not properly serve FleetBostor, and therefore, service of process was defective. FleetBoston did not have actual notice until it received a copy of the complaint on February 9, 2005, and therefore, it timely removed on February 15, 2005, which was well within the 30-day statutory period. Accordingly, we affirm in this respect.

IV.

"We review questions of subject matter jurisdiction de novo." Milan Express, Inc. v. Averitt Express, Inc., 208 F.3d 975, 978 (11th Cir. 2000).

Section 1257(a) limits review of final judgments rendered by the highest court of a state to the United States Supreme Court. 28 U.S.C.A. § 1257(a). The *Rooker-Feldman* doctrine explains that federal district courts may only exercise

original jurisdiction and not appellate jurisdiction over state court judgments, as that is reserved under § 1257 to the United States Supreme Court.*See* Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

The United States Supreme Court recently revisited the *Rooker-Feldman* doctrine in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). In *Exxon Mobil Corp.*, a defendant was sued in state court, but countersued in federal district court. 544 U.S. at , 125 S. Ct. at 1525. After the defendant won at trial in state court, the plaintiff appealed to the state supreme court. *Id.* Meanwhile, the plaintiff attempted to dismiss the federal case, but its motion was denied. *Id.* The plaintiff took an interlocutory appeal to the Third Circuit Court of Appeals, which on its own motion raised the question of whether subject matter jurisdiction over the case fails under the *Rooker-Feldman* doctrine because the claims had already been litigated in state court. *Id* . The United States Supreme Court granted certiorari and answered that federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court. Id at 1526-27. Furthermore, the Supreme Court stated that a district court is not without subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. *Id.* Without more, the Court held that Exxon Mobil had not repaired to federal court to undo the state court judgment, and that *Rooker-Feldman* did not vanquish jurisdiction after Exxon Mobil prevailed in the state court. Id. at 1527-28.

Subject-matter jurisdiction in federal court can be found under either 28 U.S.C. § 1331, federal question, or 28 U.S.C. § 1332, diversity jurisdiction. To establish federal question jurisdiction, FleetBoston must demonstrate that the complaint

alleges a violation of constitutional rights or a right created under a federal law. 28 U.S.C. § 1331.[14]

When a case is removed to federal district court under original jurisdiction "the federal court takes it as [though] everything done in the state court had in fact been done in the federal court." Savell v. S. Ry. Co., 93 F.2d 377, 379 (5th Cir. 1937). Therefore, "a federal district court may dissolve or modify injunctions, orders, and all other proceedings which have taken place in state court prior to removal." Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248, 1252 (11th Cir. 1988).

The Rooker-Feldman doctrine does not apply here because FleetBoston was invoking the district court's original jurisdiction over the case and was not appealing the state court judgment.*See* Exxon Mobil Corp., 544 U.S. at , 125 S. Ct. at 1527.

The district court, however, properly found that it could exercise original jurisdiction. The district court had § 1332 diversity jurisdiction because the controversy existed between citizens of Georgia and Delaware, and the amount in controversy was well above the requisite $ 75,000. In addition, the district court had § 1331 federal question jurisdiction because Ware asserted violations of federal statutes.

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[14] FleetBoston argued that to the extent that Ware's allegations of federal law violations were not frivolous, the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The district court ultimately dismissed Ware's federal law claims. Because Ware refers to these claims only once in his initial brief, in the statement of the facts section, and without any citation to legal authority, these claims are waived. *See*, Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989).

Furthermore, because the state action was properly removed to federal district court under original jurisdiction, the district court had authority to set aside orders of the state court under Rule 60(b). *See* Savell, 93 F.2d at 379; wwwMaseda, 861 F.2d at 1252.

In sum, because the district court had subject-matter jurisdiction over the case, and FleetBoston was seeking to defend against the action under original jurisdiction, the Rooker-Feldman doctrine does not apply. Accordingly, we affirm in this respect.

AFFIRMED.

APPENDEX 52

United States Court of Appeals

For the Eleventh Circuit

No. 05-13565

D. C. Docket No.
05-00426-CV-MHS-1

FILED

TONY L. WARE, CEO
T.L. WARE BOTTLING COMPANY, INC.

Plaintiffs-Appellants

versus

FLEETBOSTON FINANCIAL CORP.,
f.k.a. BankBoston Corp.

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 2, 2006

For the Court: Thomas K. Kahn, Clerk

O.C.G.A. § 9-11-54.

(a) *Definition.* The term 'judgment,' as used in this chapter, includes a decree and any order from which an appeal lies.

(b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

O.C.G.A. § 9-11-55

(a) *When case in default; opening as matter of right; judgment.* If in any case an answer has not been filed within the time required by this chapter, the case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter of right by the filing of such defenses within 15 days of the day of default, upon the payment of costs. If the case is still in default after the expiration of the period of 15 days, the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, without the intervention of a jury, unless the action is one ex delicto or involves

unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury, with the right of the defendant to introduce evidence as to damages and the right of either to move for a new trial in respect of such damages; provided, however, in the event a defendant, though in default, has placed damages in issue by filing a pleading raising such issue, either party shall be entitled, upon demand, to a jury trial of the issue as to damages. An action based upon open account shall not be considered one for unliquidated damages within the meaning of this Code section.

(b) *Opening default.* At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and shall announce ready to proceed with the trial.

O.C.G.A. § 9-11-56.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

O.C.G.A. § 9-11-62

(a) *Stay upon entry of judgment.* No execution shall issue upon a judgment nor shall proceedings be taken for its

enforcement until the expiration of ten days after its entry, except that, in the case of a default judgment, execution may issue and enforcement proceedings may be taken at any time after entry of judgment and except that, in any case in which both the plaintiff or plaintiffs and the defendant or defendants agree, in writing, and file a copy of such agreement with the clerk of the court, execution may issue and enforcement proceedings may be taken at any time after entry of judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. Subsection (c) of this Code section governs the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

O.C.G.A. § 14-2-1520

(a) A foreign corporation authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the Secretary of State. A foreign corporation authorized to transact business in this state that merges with and into a domestic corporation pursuant to Code Section 14-2-1107 and is not the surviving corporation in such merger need not obtain a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to transact business in this state may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(4) A mailing address to which a copy of any process served on him under paragraph (3) of this subsection may be mailed under subsection (c) of this Code section; and

(5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State under this Code section is service on the foreign corporation. Any party that serves process upon the Secretary of State in accordance with this subsection shall also mail a copy of the process to the chief executive officer, chief financial officer, the secretary of the foreign corporation, or a person holding a comparable position, at the mailing address set forth under subsection (b) of this Code section.

Georgia Uniform Superior Court Rules

Rule 15. Default judgments.

The party seeking entry of a default judgment in any action shall certify to the court the date and type of service effected and that no defensive pleading has been filed by the defendant as shown by court records. This certificate shall be in writing and must be attached to the proposed default judgment when presented to the judge for signature.

Supreme Court, U.S.
FILED
AUG 25 2006
CLERK

No. 06-146

IN THE

Supreme Court of the United States

TONY L. WARE,

Petitioner,

v.

FLEETBOSTON FINANCIAL CORPORATION,
fka BANKBOSTON CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should accept Petitioner's invitation to abandon the narrow interpretation of the *Rooker-Feldman* doctrine set forth only last year in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), and determine whether *Rooker-Feldman* is a comprehensive bar to the removal from state court of every case in which the state court has entered a judgment, regardless of whether the judgment was procured by fraud, is a final judgment, and the extent to which the removed lawsuit seeks appellate review of the judgment in federal court.

2. Whether this Court should review the Eleventh Circuit's determination under state law that a corporate defendant, which has been dissolved, remains amenable to suit and therefore has standing to remove to federal court a lawsuit brought against it.

3. Whether this Court should exercise certiorari jurisdiction to interpret state corporation law and determine whether the removal of a lawsuit to federal court by a corporate defendant, which has been dissolved, is "moot."

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Tony L. Ware. Respondent is FleetBoston Financial Corporation, which is a dissolved corporation originally organized under the laws of Delaware. T.L. Ware Bottling Company, Inc. was a party to the proceedings below.*

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* Petitioner Tony L. Ware purports to petition this Court on behalf of himself and T.L. Ware Bottling Company, Inc. (Pet. 1), but he is not an attorney licensed to practice before this Court. For this reason, he cannot represent T.L. Ware Bottling Company, Inc. before this Court, and no petition on behalf of T.L. Ware Bottling Company, Inc. properly is pending. *See* S. Ct. R. 9; *see also Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-02 (1993) ("It has been the law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel.").

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SUMMARY OF REASONS FOR DENYING THE PETITION

Petitioner Tony L. Ware ("Ware") has presented no compelling reason for this Court to exercise certiorari jurisdiction in this case. *See* S. Ct. R. 10. Ware presents three issues to the Court in his petition for writ of certiorari: the applicability of the *Rooker-Feldman* doctrine in this case; whether Respondent FleetBoston Financial Corporation ("FleetBoston") was amenable to suit under state corporation law and therefore had standing to remove the case to federal court; and whether the removal of the case was "moot" because FleetBoston had been dissolved. With respect to the standing and mootness issues that his petition presents, Ware does not even attempt to show that the resolution of these issues below conflicts with the decisions of this Court or evidences a circuit split. To the contrary, Ware simply contends that this Court never has addressed the specific standing and mootness issues presented in this case and that it therefore should do so. (Pet. 28)

With respect to *Rooker-Feldman*, Ware contends that the Eleventh Circuit's resolution of this question conflicts with its own precedents and the decisions of six other courts of appeals. (Pet. 6-8) The intra- and inter-circuit splits that Ware suggests, however, are illusory. Most of the cases on which Ware relies were decided before this Court clarified the scope of the *Rooker-Feldman* doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), and, as such, do not indicate that a circuit split exists today. Moreover, the cases to which Ware points are distinguishable from this case. Ware has identified no conflict between the Eleventh Circuit's *Rooker-Feldman* holding in this case and any decision of a court of appeals. Ware fails to show a compelling reason for granting the petition. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Proceedings in State Court

FleetBoston is a Delaware corporation that at one time was registered to do business in Georgia but withdrew its registration and was dissolved in July 2004. (Pet. App. 27) Ware is a serial litigant whose abusive and frivolous litigation tactics are known to Georgia courts.[1] (Pet. App. 39-40) In December 2004, Ware and T.L. Ware Bottling Company, Inc. ("Ware Bottling") filed suit against FleetBoston in the Superior Court of Fulton County, Georgia, alleging that FleetBoston was responsible for the purportedly wrongful repossession more than ten years earlier of a car leased to Ware. (Pet. App. 26-27)

On December 10, 2004, Ware attempted to serve FleetBoston with process by certified mail. (Pet. App. 27) The mailing, however, was incorrectly addressed, and the Postal Service returned it, marked "addressee unknown," to Ware on December 20. (Pet. App. 27) Ware nevertheless executed an affidavit of service of process only three days later, attesting under oath that he had personally served FleetBoston with process on December 10. (Pet. App. 27-28) This affidavit subsequently was filed with the superior court. (Pet. App. 28) On January 27, 2005, Ware also filed a certificate of default with the superior court, in which Ware again attested under oath that FleetBoston had been served with process and was in default. (Pet. App. 28)

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1. *See also Ware v. Vaughn*, 225 Ga. App. 303, 483 S.E.2d 698, 700 (1997) ("[W]e find this appeal and the entire appeal procedure used by Ware to be wholly and egregiously frivolous and abusive, and we find that the appeal has been litigiously pursued for the purpose of harassment. . . .").

On January 28, a proposed "consent" order was presented to Judge Gino M. Brogdon, who was serving as the presiding superior court judge for the week. (Pet. App. 28) Although the proposed order recited that all parties had agreed to its terms, it was signed only by Ware and his attorney. (Pet. App. 28) Judge Brogdon signed the order, which awarded Ware a default judgment against FleetBoston for more than $922 million. (Pet. App. 28) On February 2, Judge Bensonetta Tipton Lane, the superior court judge to whom the case was assigned, *sua sponte* vacated Judge Brogdon's default judgment and set the default issues for hearing. (Pet. App. 28) The following day, Judge Lane's chambers also mailed to FleetBoston copies of Judge Brogdon's default judgment and Judge Lane's order vacating the default judgment. (Pet. App. 29) FleetBoston first learned of Ware's lawsuit when it received the materials mailed from Judge Lane's chambers. (Pet. App. 29, 34)

Before FleetBoston learned of the lawsuit, however, another proposed "consent" order was presented on February 7 to Judge Jerry W. Baxter, who then was serving as the presiding judge for the week. (Pet. App. 28) This proposed order recited that all parties had consented to its terms, but it again was signed only by Ware and his attorney. (Pet. App. 29) When the proposed order was presented to Judge Baxter, he was told that *all* parties – both plaintiffs and the defendant – had agreed to the order. (Pet. App. 29) Based on these representations, Judge Baxter signed the order without first reviewing it. (Pet. App. 29) This order vacated Judge Lane's order and reinstated Judge Brogdon's default judgment. (Pet. App. 28) The next day, Ware filed a notice of appeal from the default judgment.[2] (Pet. App. 29)

2. The district court surmised that Ware's attempt to appeal a default judgment that he (or his counsel) prepared and that granted him all the relief he sought likely was an effort to divest Judge Lane of jurisdiction, lest she vacate the order that was fraudulently procured from Judge Baxter. (Pet. App. 29)

Ware never paid the mandatory appellate costs, however, and he failed to perfect the appeal.[3] (Pet. App. 29)

B. Proceedings in the District Court

FleetBoston filed a notice of removal on February 15, removing Ware's lawsuit to the United States District Court for the Northern District of Georgia. (Pet. App. 30) In district court, FleetBoston filed a motion pursuant to Fed. R. Civ. P. 60(b) to set aside the fraudulent default judgment. (Pet. App. 25, 30) FleetBoston also filed motions pursuant to Fed. R. Civ. P. 12(b) to dismiss the lawsuit for lack of personal jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted. (Pet. App. 25, 30) Ware, on the other hand, filed a motion to remand the case to state court.[4] (Pet. App. 25, 31) As grounds for the motion to remand, Ware argued, among other things, that removal of the case was untimely, that FleetBoston lacked standing to remove the case because it was not authorized at the time of removal to do business in Georgia, that FleetBoston could not remove the case from superior court because Ware's notice of appeal divested the superior court of jurisdiction before a notice of removal was filed, and that the district court lacked subject-matter jurisdiction. (Pet. App. 31-32) Ware did not respond to the motions that FleetBoston filed. (Pet. App. 32)

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3. Affidavits of clerks of the superior court and state supreme court, which were filed below, confirmed that no appeal was pending at the time FleetBoston removed the case to federal court. (Pet. App. 35)

4. In support of this motion to remand, Ware filed with the district court another affidavit of service of process, which again misrepresented that FleetBoston had been served with process on December 10, 2004 by certified mail. (Pet. App. 31)

The district court denied Ware's motion to remand. (Pet. App. 41) In its order, the district court characterized Ware's arguments in support of the motion to remand as "frivolous" (Pet. App. 32), and it held that:

- FleetBoston never was properly served with process, and it did not receive a copy of Ware's pleadings until February 8, 2005. Accordingly, the notice of removal that FleetBoston filed on February 15 was timely. (Pet. App. 33-34)

- FleetBoston could remove the case notwithstanding that it was not authorized at the time of removal to do business in Georgia. The district court noted that Georgia law expressly provides that a foreign corporation's failure to obtain a certificate of authority does not prevent the corporation from "defending any proceeding in this state." (Pet. App. 35-36 (citing O.C.G.A. § 14-2-1502(d))

- Ware's notice of appeal did not bar removal. Based on the affidavits of personnel in the superior court clerk's office and the clerk of the Georgia Supreme Court, the district court concluded that no appeal was pending at the time the case was removed. And the district court held that an appeal does not necessarily bar timely removal in any event. (Pet. App. 35)

- The district court properly could exercise original jurisdiction under both the federal question jurisdiction statute, 28 U.S.C. § 1331, and the diversity jurisdiction statute, 28 U.S.C. § 1332. The district court's exercise of federal question

> jurisdiction was premised on the federal questions presented by Ware's claims against FleetBoston for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and the Trade Secrets Act, 18 U.S.C. § 1832. The district court's exercise of diversity jurisdiction was based on the diverse citizenship of the parties and the amount put in controversy by Ware's claims against FleetBoston. (Pet. App. 35)

The district court granted FleetBoston's motion to set aside the default judgment and dismissed the lawsuit for failure to state a claim.[5] (Pet. App. 36, 41) The district court also concluded that the frivolous pleadings filed by, and abusive litigation tactics employed by, Ware and his attorney warranted the imposition of sanctions. (Pet. App. 38)

C. Proceedings in the Eleventh Circuit

Ware appealed to the Eleventh Circuit from the district court's denial of his motion to remand, the grant of FleetBoston's motion to set aside, and the dismissal of his lawsuit. (Pet. App. 44) On appeal, Ware argued, among other things, that the *Rooker-Feldman* doctrine barred the district court's exercise of jurisdiction in this case and that FleetBoston did not have capacity to remove the case because it had been dissolved. (Pet. App. 44) A panel of the Eleventh Circuit rejected Ware's arguments and unanimously affirmed. (Pet. App. 51)

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5. After the district court denied Ware's motion to remand and granted FleetBoston's motion to set aside, Ware filed a motion in which he raised *Rooker-Feldman* for the first time. (Pet. 5) This motion also was denied (Pet. 5), but Ware did not appeal from its denial. (Pet. App. 44)

With respect to Ware's *Rooker-Feldman* argument, the Eleventh Circuit acknowledged this Court's recent decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), and noted that *Rooker-Feldman* applies only to cases in which a lower federal court is called upon to exercise *appellate*, as opposed to original, jurisdiction to review a state court judgment. (Pet. App. 48-49) The Eleventh Circuit also noted the well-settled notion that, when a case is removed, the district court is vested with authority to modify orders entered by a state court prior to removal to the extent that the case properly is within the district court's original jurisdiction. (Pet. App. 50) Applying these principles to this case, the Eleventh Circuit concluded that the district court "properly found that it could exercise original jurisdiction," pursuant to both the federal question and diversity jurisdiction statutes. (Pet. App. 50) As such, *Rooker-Feldman* did not apply "because FleetBoston was invoking the district court's original jurisdiction over the case and was not appealing the state court judgment." (Pet. App. 50) Concerning Ware's standing argument, the Eleventh Circuit held that state law authorized FleetBoston to defend itself in litigation notwithstanding its dissolution and lack of a certificate of authority to do business in Georgia. (Pet. App. 46)

REASONS FOR DENYING THE PETITION

A. This Court recently addressed the scope of *Rooker-Feldman.*

Ware's petition invites this Court to reconsider the scope of the *Rooker-Feldman* doctrine. (Pet. 13) Only last year, however, the Court did precisely that. In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the Court identified "the limited circumstances" in which the doctrine applies, 544 U.S. at 291, and thereby clarified "the narrow ground occupied by *Rooker-Feldman.*" *Id.* at 284. Although previously the *Rooker-Feldman* doctrine had been "[v]ariously interpreted in the lower courts," *id.* at 283, the lower courts now regularly acknowledge that *Rooker-Feldman* is narrowly confined to the limited circumstances identified in *Exxon Mobil. See, e.g., McCormick v. Braverman*, 451 F.3d 382, 391-92 (6th Cir. 2006); *Turner v. Crawford Square Apartments III*, 449 F.3d 542, 547 (3rd Cir. 2006); *Coles v. Granville*, 448 F.3d 853, 858 (6th Cir. 2006); *Guttman v. Khalsa*, 446 F.3d 1027, 1031-32 (10th Cir. 2006); *Torromeo v. Town of Fremont*, 438 F.3d 113, 115 (1st Cir. 2006); *Davani v. Virginia Dep't of Transp.*, 434 F.3d 712, 713 (4th Cir. 2006). So soon after *Exxon Mobil*, there is no compelling reason for this Court to again address the scope of *Rooker-Feldman.*

Nothing in Ware's petition suggests otherwise. In an effort to manufacture a circuit split with respect to *Rooker-Feldman*, Ware cites eleven decisions of the First, Second, Sixth, Seventh, Eighth and Tenth Circuits that, he contends, conflict with the Eleventh Circuit's decision in this case. (Pet. 6-8) Ten of these decisions, however, predate *Exxon Mobil.* Even if these decisions were inconsistent with the

Eleventh Circuit's decision in this case, they were decided without the benefit of *Exxon Mobil*, and they provide no reason to believe that *Exxon Mobil* does not give the lower courts adequate guidance about the applicability of *Rooker-Feldman* in cases like this one. The eleventh decision cited by Ware makes only passing reference to *Rooker-Feldman* and was decided on other grounds. *See Baby C. v. Price*, 138 Fed. Appx. 81, 83-84 (10th Cir. 2005).

B. The Eleventh Circuit correctly held that *Rooker-Feldman* did not bar the removal of this case.

In any event, the Eleventh Circuit correctly decided in this case that the *Rooker-Feldman* doctrine did not bar the removal of Ware's lawsuit against FleetBoston. Indeed, the Eleventh Circuit's *Rooker-Feldman* decision below is perfectly consistent with the prior decisions of this Court concerning *Rooker-Feldman*, with the Eleventh Circuit's own precedents, and with the decisions of other courts of appeals. For these reasons, there is no compelling reason for this Court to exercise certiorari jurisdiction in this case.

1. The Eleventh Circuit's decision is consistent with this Court's precedents.

As this Court recognized in *Exxon Mobil*, application of the *Rooker-Feldman* doctrine is limited to cases in which a party invokes the jurisdiction of a lower federal court on the basis of a claim that it was wronged by a state court judgment and seeks relief from the judgment. *See Exxon Mobil*, 544 U.S. at 291 (*Rooker-Feldman* applies "when losing party in state court files suit in federal court complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment"). Put another way, *Rooker-*

Feldman simply prohibits a federal court – other than this Court – from exercising *appellate* jurisdiction to review the judgment of a state court. *See Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002). Indeed, the two cases from which the doctrine acquired its name both involved lawsuits in which the basis for the lower federal court's exercise of jurisdiction was a claim that a state court judgment itself was unconstitutional. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-15 (1923) ("The grounds advanced for resorting to the District Court are that the judgment was rendered and affirmed in contravention of [the federal constitution]."); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 469, 472-73 (1983) (plaintiffs brought suit in federal court alleging that District of Columbia court's denial of their applications for bar admission waivers violated the federal constitution and federal antitrust law). *Exxon Mobil* confirmed that the doctrine is confined to cases like *Rooker* and *Feldman*. *See Exxon Mobil*, 544 U.S. at 284.

This case is distinguishable from *Rooker* and *Feldman*. The district court's exercise of federal question jurisdiction in this case was premised on the federal questions presented by Ware's claims against FleetBoston for violations of various federal statutes. (Pet. App. 35, 50) Likewise, the district court's diversity jurisdiction was based on the diverse citizenship of the parties and the amount put in controversy by Ware's claims. (Pet. App. 35, 50) Unlike the claims in *Rooker* and *Feldman*, none of Ware's claims against FleetBoston – the very claims upon which the district court premised its exercise of jurisdiction – were based on any judgment entered by a state court, and none sought relief from any state court judgment. This case fell squarely within the original jurisdiction of the district court, and its removal is not inconsistent with any decision of this Court concerning *Rooker-Feldman*.

Ware's real complaint is not that this case was removed to federal court, but that the district court set aside the default judgment for more than $922 million that he fraudulently procured in state court. This Court never has suggested, however, that *Rooker-Feldman* precludes a district court in a properly removed action from revisiting an order entered by the state court before removal. To the contrary, the Court specifically has acknowledged that, when a case properly is removed, the district court is vested with "authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal."[6] *Granny*

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6. Moreover, this Court has suggested that the finality of a state court judgment is a necessary, but not sufficient, prerequisite to application of *Rooker-Feldman*. *See Exxon Mobil*, 544 U.S. at 291 (noting that in both *Rooker* and *Feldman*, "the losing party in state court filed suit in federal court *after the state proceedings ended*") (emphasis added); *see also Lance v. Dennis*, 126 S. Ct. 1198, 1201 (2006) ("[U]nder what has come to be known as the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over *final* state-court judgments.") (emphasis added); *Feldman*, 460 U.S. at 476 ("The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review *final* determinations of the District of Columbia Court of Appeals in judicial proceedings.") (emphasis added). This is consistent with the statutory basis for *Rooker-Feldman*, 28 U.S.C. § 1257, which vests this Court with exclusive jurisdiction among the federal courts to undertake appellate review of "[f]inal judgments or decrees" rendered in state court.

At the time FleetBoston removed this case, the default judgment was not final, and Ware's filing of a notice of appeal without paying appellate costs and perfecting the appeal did not make it otherwise. *See American Flat Glass Distrib., Inc. v. Michael*, 260 Ga. 312, 392 S.E.2d 855, 855 (1990). FleetBoston timely could have moved the superior court to set aside the judgment, *see* O.C.G.A. § 9-11-60(f),

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Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, 415 U.S. 423, 437 (1974). Ware's petition asks this Court to extend *Rooker-Feldman* in a way that would substantially limit the holding of *Granny Goose* and would repudiate the narrow construction given *Rooker-Feldman* just last year in *Exxon Mobil*.[7] Ware gives the Court no compelling reason, however, for doing so.

2. The Eleventh Circuit's decision is consistent with the Eleventh Circuit's own precedents.

Ware contends that this Court should grant certiorari in this case because the Eleventh Circuit's decision below conflicts with its own precedents, specifically *Martyak v. Martyak*, 2006 WL 466641 (11th Cir. 2006) (unpublished decision). But unlike this case, *Martyak* is a paradigmatic *Rooker-Feldman* case. In *Martyak*, the defendant removed the case to federal court on the ground that the state court had entered an unconstitutional alimony judgment. That is,

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and FleetBoston timely could have appealed the judgment to the state appellate courts. *See* O.C.G.A. § 5-6-38. That FleetBoston instead removed the case and moved the district court to set aside the judgment pursuant to Fed. R. Civ. P. 60 does not offend *Rooker-Feldman*.

7. Ware does not cite a single decision of this Court in which a district court properly exercised jurisdiction in a removed case but offended *Rooker-Feldman* by granting a motion to set aside. Although this Court has not addressed the issue in terms of *Rooker-Feldman*, it has held more than once that a district court properly may set aside or modify a state court default judgment after removal. *See, e.g., Harter v. Kernochan*, 103 U.S. 562 (1880); *French v. Hay*, 89 U.S. 238 (1874).

the defendant identified the state court's decision – not the original, underlying claims asserted against him – as the basis for the federal court's jurisdiction. As the Eleventh Circuit recognized, this amounted to an effort to secure *appellate* review of the state court's decision in federal court and is precisely what *Rooker-Feldman* forbids. *Martyak* is not at all inconsistent with the Eleventh Circuit's decision in this case.

3. The Eleventh Circuit's decision is consistent with the decisions of other courts of appeals.

Ware also contends that, with respect to *Rooker-Feldman*, the Eleventh Circuit's decision in this case conflicts with the decisions of other courts of appeals. In particular, Ware identifies eleven decisions in other circuits that, he asserts, conflict with the Eleventh Circuit's decision below. In three of the cases on which Ware relies, however, the court of appeals did not even decide whether *Rooker-Feldman* applied to bar a district court from exercising jurisdiction. These decisions make only passing reference to the scope of the doctrine and do not indicate a circuit split. *See, e.g.*, *Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42 (1st Cir. 2003); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000); *Baby C. v. Price*, 138 Fed. Appx. 81 (10th Cir. 2005).

The other decisions that Ware cites are distinguishable from this case. In *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001), the claims that the plaintiff sought to submit to the district court required an evaluation of a state court judgment that, before the *Rooker-Feldman* issue was resolved by the Sixth Circuit, already had been affirmed by the state court of appeals. In *Taylor v. Federal*

Nat. Mortgage Ass'n, 374 F.3d 529 (7th Cir. 2004), the lawsuit removed to federal court sought damages and other relief from an allegedly wrongful state court foreclosure judgment. In *Auston v. North Carolina*, 1997 WL 312285 (7th Cir. 1997) (unpublished decision), a lawsuit was filed originally in federal court alleging that the plaintiff's federal constitutional and statutory rights were violated in state court proceedings to terminate the plaintiff's parental rights and seeking damages arising from the state court action. In *Downs v. Westphal*, 78 F.3d 1252 (7th Cir. 1996), the defendant removed a state court foreclosure action to federal court and asserted as a defense that a final state court judgment – entered in another action by a state court other than the one from which the case was removed – upon which the plaintiff based his claims was invalid. In *Wright v. Tackett*, 39 F.3d 155 (7th Cir. 1994), the plaintiff brought a civil rights action in federal court alleging that the defendants – including three state court judges – conspired to deprive the plaintiff of his property without due process in several state court foreclosure cases. In *Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031 (8th Cir. 1999), the class action removed to federal court challenged allegedly unlawful interest awards in state court deficiency judgments and sought an injunction requiring the defendant to amend these judgments. In *Neal v. Wilson*, 112 F.3d 351 (8th Cir. 1997), an attorney removed state court disciplinary proceedings to federal court and asserted counterclaims and third-party claims against several state court judges and other state officials, alleging that the state court proceedings violated his federal constitutional and statutory rights. In *Edwards v. Bank of New York*, 63 Fed. Appx. 445 (10th Cir. 2003), the plaintiff brought claims presenting federal questions in district court seeking review of, and relief from, a state court foreclosure judgment, which the state intermediate appeals court already had affirmed and the state supreme court had declined to review.

Many of the decisions that Ware cites, unlike this case, are paradigmatic *Rooker-Feldman* cases. And all of the cases upon which Ware relies involve materially different circumstances than this case. These cases do not indicate a circuit split, and they suggest no compelling reason for this Court to exercise certiorari jurisdiction in this case.

C. The Eleventh Circuit correctly decided that FleetBoston had standing to remove this case notwithstanding its dissolution.

Ware also contends that FleetBoston lacked standing to remove this lawsuit to federal court because it is a dissolved corporation. (Pet. 18-20) It is well settled, however, that the capacity of a corporation after its dissolution to defend lawsuits is determined by the laws of the state in which the corporation was organized. *See Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127-29 (1937). FleetBoston is a Delaware corporation, and Delaware law provides that a corporation is continued after its dissolution "for the purpose of prosecuting and defending suits" commenced within three years of the dissolution. 8 Del. Code § 278. FleetBoston was dissolved in July 2004 (Pet. App. 27), and Ware filed this lawsuit in December 2004. (Pet. App. 26-27) At the time Ware initiated his lawsuit, and at the time FleetBoston removed it to federal court, FleetBoston was amenable to suit. The Eleventh Circuit's determination that FleetBoston had standing to remove the case was a correct application of well-settled law, and Ware offers no compelling reason for this Court to exercise its certiorari jurisdiction to consider the question.[8]

8. Ware casts his standing argument in terms of the constitutional standing requirement that a party seeking relief have suffered an "injury in fact." (Pet. 18-19) To the extent that the Article III standing requirements apply at all to a defendant not seeking affirmative relief,

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D. No compelling reason exists for this Court to exercise certiorari jurisdiction to consider Ware's argument that the dissolution of FleetBoston rendered the removal of this case "moot."

Finally, Ware contends that the removal of this case was "moot" because FleetBoston, a dissolved corporation, lacked "a legally cognizable interest in the outcome of the case." (Pet. 20) It is not apparent, and Ware does not explain, how this contention differs in substance from his standing argument. *Cf. Friends of the Earth, Inc. v. Laidlaw Environ. Servs., Inc.*, 528 U.S. 167, 189-92 (2000) (acknowledging that standing and mootness doctrines are distinct but overlap to some extent). In any event, the mootness argument is as unfounded as it is confusing. At the time FleetBoston removed this case, it was amenable to suit as a matter of Delaware law. *See* 8 Del. Code § 278. Accordingly, FleetBoston certainly had "a legally cognizable interest in the outcome" of a case in which Ware sought – and had fraudulently obtained in state court – a judgment for more than $922 million. Ware's suggestion otherwise is preposterous. There is no compelling reason for this Court to exercise its certiorari jurisdiction to address such a patently frivolous position.[9]

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it seems apparent that Ware's initiation of a lawsuit against FleetBoston, and his fraudulent procurement of a default judgment for more than $922 million, are adequate "injuries in fact" to give FleetBoston standing to remove.

9. Ware also contends that the removal was "moot" because FleetBoston "had legally consented to the jurisdiction of the Georgia State Courts when it appointed the Georgia Secretary of State to become its agent for all legal service of process concerning any lawsuit." (Pet. 20) Ware does not explain, however, how this would moot the removal of the case, and the explanation is not self-evident. This argument likewise does not merit review in this Court.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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